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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1458

STATE OF LOUISIANA AND THE PARISH OF CADDO,
Petitioners,

versus

GULF STATES THEATRES OF LOUISIANA, INC., ET AL.,
Respondents.

STATE OF LOUISIANA,
Petitioner,

versus

SHREVEPORT NEWS AGENCY, INC.,
Respondent.

JOHN A. RICHARDSON AND GEORGE W. D'ARTOIS,
Petitioners,

versus

GULF STATES THEATRES OF LOUISIANA, INC., ET AL.,
Respondents.

STATE OF LOUISIANA,
Petitioner,

versus

RICHARD LEE McNUTT,
Respondent.

PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

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RICHARD LEE McNUTT,
Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The State of Louisiana, the Parish of Caddo, John A. Richardson and George W. D'Artois pray that Writs of Certiorari issue to review the judgments of the Supreme Court of Louisiana entered on January 11, 1974, in the above cases. Pursuant to Rule 23 (5) of the Rules of this Court and because these cases involve identical or closely related questions, a single Petition for Writs of Certiorari covering all the cases is presented.

I.

OPINIONS BELOW IN STATE OF LOUISIANA AND PARISH OF CADDO VS. GULF STATES THEATRES OF LOUISIANA, INC., ET AL

The case of "State of Louisiana and the Parish of Caddo Vs. Gulf States Theatres of Louisiana, Inc. et al" (Referred to hereinafter as "The Stewardesses") is a civil suit arising from an action brought by John A. Richardson, District Attorney of the exhibition of a motion picture entitled "The Stewardesses" which is obscene as defined by LSA R.S. 14:106. The authority

to abate this nuisance is found in LSA R.S. 13:4711 through 13:4717. The Louisiana Obscenity Statute and the Louisiana Abatement of Nuisances Statutes are attached hereto as Appendix A.

After a trial on the merits, the motion picture "The Stewardesses" was held to be obscene and its showing in Caddo Parish, Louisiana, was permanently enjoined. The Trial Court's opinion is attached hereto as Appendix B. Respondents then appealed to the Court of Appeal of Louisiana, Second Circuit and that Court declared R.S. 13:4711 et.seq. unconstitutional and reversed the ruling of the Trial Court. This opinion is reported at 255 So.2d 857 (La.App. 2nd Cir. 1971) and is attached hereto as Appendix C.

Petitioners herein then applied for Writs of Review to the Louisiana Supreme Court, which were granted, and that Court reversed the State Appellate Court and held R.S. 13:4711 et.seq. to be constitutional and found "The Stewardesses" to be obscene. That opinion is reported at 270 So.2d 547 (1973) and is attached as Appendix D.

On Respondents' Application for Rehearing, which was granted, the Supreme Court of Louisiana affirmed its original decision in an opinion rendered December 18, 1972, reported at 270 So.2d 562 (1973) and is included as part of Appendix D.

Subsequently, Respondent herein applied for Writs of Certiorari to this Court, which were granted, and this Court vacated the judgment of the Supreme Court

of Louisiana and remanded this case to that Court for further consideration in light of this Court's decision in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); *Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *United States v. 12 200-ft. Reels of Super 8 mm Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973); *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), and *Alexander v. Virginia*, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973). That decision is reported at 413 U.S. 913, 93 S.Ct. 3063, 37 L.Ed.2d 1037 and attached hereto as Appendix E.

On remand, a hearing was held in this case in the Louisiana Supreme Court and that Court, for the reasons assigned by it in *State v. Shreveport News Agency, Inc.*, infra, *State v. McNutt*, infra, and *Gulf States Theatres of Louisiana, Inc. v. John A. Richardson and George W. D'Artois*, infra, reversed its previous judgment rendered on rehearing and Relators' suit was dismissed. That opinion is reported at 287 So.2d 496 (1974) and is attached as Appendix F.

Relators timely applied for rehearing and on January 11, 1974, the Louisiana Supreme Court denied rehearing. An excerpt from the Notice of Denial of Rehearing is attached hereto as Appendix G.

Following the denial of rehearing by the Supreme Court of Louisiana, Relators herein applied to that Court for a Stay of its judgment pending Application for Writs of Certiorari to this Court. The Stay Order was entered by the Chief Justice of the Supreme Court of Louisiana, a copy of that Stay Order being attached hereto as Appendix H.

OPINIONS BELOW IN JOHN A. RICHARDSON AND GEORGE W. D'ARTOIS VS. GULF STATES THEATRES OF LOUISIANA, INC. ET AL

This is also a civil case (Referred to in this petition as "Last Tango") which originally arose as a result of the efforts by Respondents herein, Gulf States Theatres of Louisiana, Inc., United Artists Corporation and Joe Gianforte, to unlawfully exhibit and disseminate obscenity and hardcore pornography and as a result of the good faith efforts of John A. Richardson and George W. D'Artois to enforce the criminal laws of the State of Louisiana. The Respondents in this case commenced the showing of the "X" rated, obscene motion picture entitled "Last Tango in Paris" at a theatre in Shreveport, Louisiana. Legal proceedings were instituted in connection with the showing of this obscene motion picture and in connection with these proceedings, Relators sought a permanent injunction prohibiting the showing of the obscene motion picture. After a trial was held, the Trial Court ruled that the movie "Last Tango in Paris" was obscene under the provisions of R.S. 14:106 and, pursuant to the provisions of R.S. 13:4711 et.seq., enjoined the further showing of said obscene motion picture in Caddo Parish,

Louisiana. A copy of the Trial Court's judgment is attached hereto as Appendix I.

Respondents then applied to the Supreme Court of Louisiana for Writs of Certiorari, which were granted. The Supreme Court of Louisiana reversed the Trial Court and held the provisions of R.S. 13:4711 et.seq. to be unconstitutional and further stated that the provisions of R.S. 14:106 were unconstitutional because of this Court's decision in *Miller v. California* as outlined by the Supreme Court of Louisiana in its decision handed down in *State of Louisiana v. Shreveport News Agency, Inc.*, infra. The opinion in this case is reported at 287 So.2d 480 (1974) and is attached as Appendix J. Relators then timely applied for rehearing in the Supreme Court of Louisiana but rehearing was refused by that Court on January 11, 1974. An excerpt from the notice refusing to grant the rehearing is attached as Appendix G.

Following the denial of rehearing, Relators applied to the Louisiana Supreme Court for a stay of its judgment pending Application for Writs of Certiorari to this Court. The Stay Order was entered by the Chief Justice of the Supreme Court of Louisiana, a copy of that Stay Order being attached hereto as Appendix K. Subsequently, however, this Stay Order was amended by the Louisiana Supreme Court; so as to expire on February 15, 1974, unless a further Stay was obtained from a Justice of the United States Supreme Court. This order is attached as Appendix L. Relators applied to the Honorable Lewis F. Powell, Jr., Associate

Justice of this Court, for a Stay Order, which application was denied on February 14, 1974.

OPINIONS BELOW IN STATE OF LOUISIANA VS. SHREVEPORT NEWS AGENCY, INC.

This is a crminal case in which the State of Louisiana filed Bills of Information charging Shreveport News Agency, Inc. with violations of R.S. 14:106 in connection with its possession of obscene magazines with intent to distribute. After the filing of Bills of Information charging Shreveport News Agency, Inc. with violating the obscenity laws of the State of Louisiana, Motions to Quash were filed on behalf of Shreveport News Agency, Inc. contending that R.S. 14:106 was unconstitutional. The Trial Court overruled the Motion to Quash, holding that R.S. 14:106 was valid and enforceable. Shreveport News Agency, Inc. then applied to the Louisiana Supreme Court for Writs of Certiorari, which were granted, and that Court reversed the Trial Court and held that R.S. 14:106 was unconstitutional. That opinion is reported at 287 So.2d 464 (1974) and is attached as Appendix M.

Relators herein timely applied to the Louisiana Supreme Court for rehearing, but rehearing was refused on January 11, 1974. An excerpt from the notice of the denial of rehearing is attached hereto as Appendix G.

Following the denial of rehearing by the Supreme Court of Louisiana, Relator herein applied to that Court for a stay of its judgment pending Application for Writs

of Certiorari to this Court. The Stay Order was entered by the Chief Justice of the Supreme Court of Louisiana, a copy of that Stay Order being attached hereto as Appendix N.

OPINIONS BELOW IN STATE OF LOUISIANA VS. RICHARD LEE McNUTT

This is also a criminal case arising in New Orleans, Louisiana where Richard Lee McNutt was prosecuted for violating the Louisiana Obscenity Statute, R.S. 14:106. He was tried and found guilty.

However, the Louisiana Supreme Court reversed and, for the reasons assigned in *State of Louisiana vs. Shreveport News Agency, Inc., supra*, found the Louisiana Obscenity Statute to be unconstitutional. The conviction and sentence was then set aside and the defendant ordered discharged. This opinion is reported at 287 So.2d 478 (1974) and is attached as Appendix O.

The State timely applied for rehearing but the rehearing was denied on January 11, 1974. An excerpt from the notice of denial of rehearing is attached as Appendix G.

Following the denial of rehearing by the Supreme Court of Louisiana, Relator herein applied to that Court for a stay of its judgment pending Application for writs of Certiorari to this Court. The Stay Order was entered by the Chief Justice of the Supreme Court of Louisiana,

a copy of that Stay Order being attached hereto as Appendix P.

JURISDICTION

The decisions in all four of these cases became final after denial of rehearing by the Louisiana Supreme Court. Denial was ordered in all cases on January 11, 1974. This petition for writs of certiorari is presented and filed within 90 days of the orders denying rehearing. Jurisdiction of the Supreme Court of the United States of America is invoked under 28 U.S.C. 1257 (3).

Applicants urge and show in this petition that federal questions of substance have been decided by the Louisiana Supreme Court in ways which are not in accord with applicable decisions of this Court.

FEDERAL QUESTIONS PRESENTED

(1) Whether R.S. 14:106 (the Louisiana Obscenity statute) is valid and constitutional and whether the Supreme Court of Louisiana has misapplied and misinterpretated and refused to follow the pronouncements of this Court in *Miller v. California* and its companion cases.

(2) Whether Louisiana Revised Statutes 13:4711 et.seq. is constitutional *on its face* as applied to obscenity and vulgarity, when such statute:

a. Allows a temporary restraining order to issue *only* when the allegations of a petition for a temporary restraining order and the accompanying affidavit set forth, in the Judge's opinion, that *probable cause* exists to believe that a "nuisance" is being carried on;

b. Provides that if a temporary injunction issues, an adversary hearing on the issue of obscenity must be held within *five days;*

c. Provides that at the conclusion of the adversay hearing, a decision must be rendered by the Trial Judge at the *earliest possible time*;

d. Places the burden of proof on the plaintiff;

e. When read in conjunction with the general civil procedure of Louisiana, provides for prompt appellate review;

f. Allows the Court to exercise discretion in determining whether a place which is designated a "nuisance" shall be closed or allowed to remain open, and

g. When adopted, complied with the Louisiana Constitutional requirement that no act be broader than its title.

(3) Whether Louisiana Revised Statutes 13:4711 et.seq., is unconstitutional, *when applied* as it was in the *State of Louisiana and the Parish of Caddo v. Gulf States Theatres of Louisiana, Inc., et al* to enjoin the showing of a *particular obscene movie* entitled "The Stewardesses" where:

a. The properly verified and sworn petition alleged in great detail the facts upon which the obscenity was based and allowed the District Court Judge to make a *probable cause* determination of obscenity before the temporary restraining order was issued;

b. An adversary hearing was held within *five days* of the date of the filing of the suit;

c. The *plaintiffs* assumed and *carried the burden of proof*;

d. A decision on the merits of the case holding that the motion picture was obscene was rendered at the conclusion of the trial and on the *same day* thereof, and

e. The rights of the exhibitors of the obscene motion picture to *speedy appellate review were afforded* to them under the procedural laws of the State of Louisiana.

(4) Whether Louisiana Revised Statutes 13:4711 et.seq., is unconstitutional, *when applied* as it was in

Gulf States Theatres of Louisiana, Inc. et al v. John A. Richardson and George W. D'Artois to enjoin the showing of a *particular obscene movie* entitled "Last Tango in Paris" where:

a. A civil suit had been filed by the exhibitors of the obscene motion picture to enjoin the District Attorney and the Commissioner of Public Safety from taking action to prohibit the showing of said obscene motion picture and a reconventional demand was filed by the District Attorney and Police Commissioner seeking a permanent injunction prohibiting the dissemination of obscenity, *with no temporary restraining order being issued*;

b. An adversary hearing was held on the Petition for Injunction to prohibit the dissemination of obscenity in *conjunction with* the hearing to be held on the exhibitors' Petition for Injunction;

c. The Plaintiffs in reconvention assumed and carried the burden of proof;

d. A decision on the merits of the case holding that the motion picture was obscene was rendered at the conclusion of the trial and on the *same day* thereof;

e. The rights of the exhibitors of the obscene motion picture to speedy appellate review

were afforded to them under the procedural laws of the State of Louisiana.

STATEMENT OF THE CASE IN STATE OF LOUISIANA AND THE PARISH OF CADDO VS. GULF STATES THEATRES OF LOUISIANA, INC. ET AL

This suit arises from an action brought by John A. Richardson, District Attorney of the First Judicial District in and for the Parish of Caddo, in the name of the State of Louisiana and the Parish of Caddo, to abate a public nuisance existing in the city of Shreveport, namely, the exhibition of a motion picture, "The Stewardesses", which is obscene as defined by LSA R.S. 14:106. The authority to abate this nuisance is found in LSA R.S. 13:4711 through 13:4717.

"The Stewardesses" was exhibited at the Broadmoor Theatre, this theatre being located immediately across the street from a large elementary school known as the A. C. Steere school and a branch of the Shreve Memorial Library and located near a large baptist church in the city of Shreveport. The movie ran from June 11, 1971, until June 25, 1971, during which time numerous complaints were received by various public officials in the city of Shreveport and as a result of these complaints front page newspaper articles appeared in the newspapers of Shreveport which reported that officials of the city of Shreveport, primarily the Commissioner of Public Safety and the Mayor of the City, had publicly, in meetings of the Shreveport City Council, objected to the showing of "The Stew-

ardesses" in Shreveport. During this period of time and prior to June 25, 1971, the office of the District Attorney of Caddo Parish had received similar individual complaints from citizens of the city objecting to the showing of this "X" rated film. Based upon these complaints received by the District Attorney's Office, an investigation was begun into the showing of the film.

On June 25, 1971, suit was filed in the First Judicial District Court of the Parish of Caddo seeking a temporary restraining order and ultimately a permanent injunction prohibiting the showing of "The Stewardesses" and in connection with this suit a verified and sworn petition was presented to Judge James R. Alexander. Based upon the sworn statement of facts contained in that petition and after considering the law involved, a restraining order and injunction was issued by Judge Alexander against Gulf States Theatres of Louisiana, Inc., Greater Broadmoor Theatre, Inc., Joe Gianforte, and all of their agents, representatives and employees, restraining them from the continued showing of the movie "The Stewardesses". A hearing date on this petition seeking a permanent injunction was scheduled for June 30, 1971, at 10:00 o'clock A.M.

This suit and the restraining order were served upon Mr. Joe Gianforte, the manager of the Broadmoor Theatre, on Friday, June 25, 1971. Upon being served with process in that suit, the manager cancelled the showing of "The Stewardesses" scheduled for that night and closed the theatre. However, the theatre reopened the following day showing another film and

the theatre has been in continuous operation with "business as usual" since June 26, 1971, up to and including the present time, the only exception being that the film "The Stewardesses" has not been shown.

On Tuesday, June 29, 1971, Respondents presented a "Petition for Temporary Restraining Order and Preliminary and Permanent Injunction" to the Honorable Ben C. Dawkins, Jr., District Judge of the United States District Court of the Western District of Louisiana, seeking to obtain federal court intervention in the proceedings then pending in the state court; an informal hearing was held on this petition and after reviewing same and discussing the case with all counsel, Judge Dawkins declined to intervene and declined to sign the order granting a preliminary injunction or to grant any other relief whatever, Judge Dawkins stating that Respondents herein were being granted an adversary hearing in the state court to determine the obscenity or lack thereof the following day and such was the proper procedure and that Respondents were not entitled to federal relief.

An adversary hearing was held in the trial court on June 30, 1971, before the Honorable William J. Fleniken. The State of Louisiana and the Parish of Caddo, through its agent, the District Attorney for Caddo Parish, had the burden of proof and did prove by a preponderance of evidence that the movie "The Stewardesses" was obscene within the standards defined by LSA R.S. 14:106 and the standards established by the United States Supreme Court in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304 and thus satisfied the pro-

cedural requirements set forth in LSA R.S. 13:4711-13:4717.

The testimony of the witnesses called by Relators was to the effect that this movie was lewd, lascivious, obscene and sexually indecent and as a whole appealed only to prurient interests and was without any redeeming social value whatever. The movie was filed in evidence in the trial court as part of Relators' case and was viewed by the Justices of the Louisiana Supreme Court (in a private showing) prior to that Court's decision.

The evidence presented showed that the film dealt in disconnected sequences with the off-duty lives of airline stewardesses, (presumably) during stopover travel. The pursuits of these young women referred *exclusively* to their sexual encounters, showing them engaged in acts of *fornication, lesbianism, masturbation* and even, in one sequence, as the partner in an act of *sadism.*

After hearing all of the evidence, the trial court on June 30, 1971, granted a Judgment of Permanent Injunction, finding that the movie was lewd, lascivious, obscene, sexually indecent, and as a whole, appealing only to prurient interests and being without any redeeming social value whatever. The trial court permanently enjoined the showing of the motion picture entitled "The Stewardesses" at any location in Caddo Parish, Louisiana, but the trial court did not close the theatre, interpreting the statute as making it discre-

tionary with the court as to whether the theatre would be closed.

After formal Judgment of Permanent Injunction was signed by the trial court, Respondents appealed to the Louisiana Second Circuit Court of Appeals. Respondents also applied for supervisory writs in the Louisiana Supreme Court as well as in the Second Circuit Court of Appeals. Both courts denied writs.

Additionally, on July 12, 1971, Respondents herein filed a "Complaint for Injunctive and Declaratory Relief" in the United States District Court for the Western District of Louisiana under Civil Action Number 16,958 on the docket of that court, Respondents seeking by such action to have convened a Three Judge Federal District Court to consider the constitutionality of the statutes under which Relators herein had proceeded in the state courts; a Three Judge United States District Court was convened in New Orleans, Louisiana, and this case was consolidated with other cases which had arisen in New Orleans, Louisiana, and after a trial in these consolidated cases, the Three Judge United States District Court declined to take any action on the complaints of Respondents herein until there had been a final and definitive Louisiana State Court decision on the constitutionality of the statutes in question. (The Three Judge United States District Court has continued to abstain pending a final decision in this case.)

On November 16, 1971, the Louisiana Second Circuit Court of Appeal reversed the Judgment of the Trial

Court and held the provisions of R.S. 13:4711 et.seq., and particularly R.S. 13:4712, unconstitutional. See Appendix C. Subsequently, Relators applied to the Louisiana Supreme Court for Writs of Certiorari or Review, which Writs were granted.

The Louisiana Supreme Court, after considering the law and evidence in this case and *after viewing "The Stewardesses"*, ruled the state statute constitutional and the movie obscene. See Appendix D.

Thereafter, Respondents applied to this Court for Writs of Certiorari which were granted and the Judgment of the Louisiana Supreme Court was vacated and the case remanded to the Louisiana Supreme Court for further consideration in light of this Court's decision in *Miller v. California* and its companion cases. The Louisiana Supreme Court has now ruled that R.S. 13:4711 et.seq. and R.S. 14:106 are unconstitutional. See Appendix F. However, the effect of the Louisiana Supreme Court's decision has been stayed until April 11, 1974, to allow Relators to apply for Writs of Certiorari to this Court. See Appendix H.

STATEMENT OF THE CASE IN JOHN A. RICHARDSON AND GEORGE W. D'ARTOIS VERSUS GULF STATES THEATRES OF LOUISIANA, INC., UNITED ARTISTS CORP., AND JOE GIANFORTE

This suit arises as a result of the efforts by Respondents herein to unlawfully exhibit and disseminate obscenity and pornography and as a result of the good

faith efforts of Relators to enforce the criminal laws of the State of Louisiana.

On September 28, 1973, Respondents commenced the showing of the "X" rated, obscene motion picture entitled "Last Tango in Paris" at the Don Theatre in Shreveport, Louisiana. On that night, Relators, along with a number of interested citizens of Shreveport, attended the exhibition of the film at the Don Theatre. Relators saw the entire movie "Last Tango in Paris" from beginning to end as did other citizens of Shreveport.

Following the exhibition of the obscene movie, an affidavit for a search warrant was prepared which detailed the contents of the movie. Based upon the affidavit, and finding probable cause to believe that the crime of obscenity was being committed by Respondents, a search warrant was issued by a Judge of the Caddo Parish District Court authorizing law enforcement officers of the City of Shreveport to search for and seize the obscene motion picture then playing at the Don Theatre. Pursuant to the search warrant, one copy of the obscene motion picture film was seized. Copies of the search warrant and its supporting affidavit are in the record of these proceedings. In addition, and based upon similar information which was contained in the affidavit for the search warrant, an affidavit was executed before the Judge charging Joe Gianforte, Respondent herein, with the crime of obscenity. An arrest warrant was issued and Joe Gianforte was arrested, immediately made bond and was released.

However, although one copy of the film was seized pursuant to the search warrant and although Mr. Gianforte was arrested pursuant to the arrest warrant, nevertheless, Respondents were then in possession of an additional copy of the obscene motion picture film "Last Tango in Paris". Respondents then proceeded to exhibit the additional copy of the obscene film to the public at the Don Theatre on the night of September 28, 1973.

On September 29, 1973, Respondents again committed another separate act of obscenity in violation of the criminal statutes of the State of Louisiana in that they again exhibited another separate obscene motion picture film entitled "Last Tango in Paris" at the Don Theatre. After the exhibition of said film, another affidavit setting forth the obscene nature of the film was presented to a Judge of the First Judicial District Court. Based upon the allegations in that affidavit, the Judge issued a search warrant authorizing law enforcement officers to seize one separate copy of the obscene film which was then being shown by Respondents. A warrant for the arrest of Joe Gianforte on the second charge of obscenity was also issued and pursuant to that warrant Mr. Gianforte was arrested and a separate copy of the film was seized pursuant to the search warrant. Copies of the arrest warrants, search warrants and affidavits are filed in the record of these proceedings.

No other search warrants, seizures or arrests were ever effectuated or even prepared thereafter.

Subsequently, and on September 29, 1973, at approximately 5:30 P.M., Respondents filed a Petition for Temporary Restraining Order in the United States District Court for the Western District of Louisiana, seeking injunctive relief prohibiting Relators from further enforcing the obscenity laws of the State of Louisiana. On that date, the Honorable Ben C. Dawkins, Jr. issued a Temporary Restraining Order prohibiting Relators from further arresting Joe Gianforte or interfering with the showing of the obscene motion picture and ordered Relators to return one copy of the film to Respondents. Judge Dawkins further ordered an evidentiary hearing to be conducted on Monday, October 1, 1973, to determine whether a preliminary or permanent injunction would be issued against Relators. Pursuant to the Federal Court's order, Relators returned a copy of the film and Respondents continued to show said obscene motion picture film at the Don Theatre. (At this point, it should be noted that on the evening of September 28, 1973, and following the seizure of a copy of the obscene film, Respondents produced another copy of the film and showed it on the same night September 28, 1973. Also, with the return of the copy of the film which had been seized on September 29, 1973, Respondents continued to show said obscene film at all regularly scheduled showings at the Don Theatre on each and every day until approximately 9:00 P.M. on October 12, 1973, when Respondents were permanently enjoined from exhibiting the obscene motion picture by order of Judge James E. Clark of the Caddo Parish District Court, which judgment will be mentioned more fully hereinafter.)

On October 1, 1973, an evidentiary hearing was held in the United States District Court to determine whether a judgment of preliminary or permanent injunction would be rendered prohibiting Relators from further proceeding against the obscene film. At that hearing, Judge Dawkins said that he had no jurisdiction to pass upon the issue of obscenity, vel non; he did not grant any preliminary or permanent injunction, but ordered that the Temporary Restraining Order which he had previously issued remain in effect until 10:00 A.M. on October 4, 1973. At that time, according to the belief of Judge Dawkins, the State Court Judges of the Caddo Parish District Court would then be available to assume jurisdiction of this case. (The State Court Judges were then unavailable due to a Judicial Conference then being conducted in New Orleans.)

Judge Dawkins' judgment of October 1, 1973, was then immediately appealed by Respondents to the United States Fifth Circuit Court of Appeals with the request that the Temporary Restraining Order originally issued by Judge Dawkins remain in effect until the United States Fifth Circuit Court of Appeals had decided whether Judge Dawkins was in error in failing to grant a preliminary or permanent injunction. *The United States Fifth Circuit Court of Appeals refused to intervene in this case and refused to enjoin Relators in any manner whatsoever.*

On October 4, 1973, Joe Gianforte appeared in the First Judicial District Court and was araigned on two Bills of Information charging him with obscenity which had been filed on October 1, 1973. He pled not guilty

and his case was set for trial. However, Relators had previously obtained an order from Judge John F. Fant of the Caddo Parish District Court ordering Mr. Gianforte to show cause on Friday, October 5, 1973, why an evidentiary and adversary hearing to determine the obscenity, vel non, of the motion picture film should not be conducted. But, at Mr. Gianforte's arraignment on October 4, 1973, *he moved to set aside this order and prohibit the evidentiary hearing which was sought by the State.* Judge C. J. Bolin, Jr., of the Caddo Parish District Court granted Mr. Gianforte's request, recalled the rule, and thereby effectively cancelled any adversary hearing which could have been held in the criminal section of the District Court. (This was a second time that Relators were prevented from having a speedy adversary hearing.)

On that same day, October 4, 1973, Respondents herein filed the instant suit in the Civil Section of the Caddo Parish District Court seeking to restrain and enjoin Relators from interfering with the showing of the obscene motion picture, *even though Relators had not threatened or otherwise taken action to arrest anyone or otherwise interfere with the showing of the film.* Judge Fant refused to issue such a Temporary Restraining Order and Respondents applied to the Louisiana Supreme Court for a Writ of Mandamus.

The Louisiana Supreme Court then intervened in the proceedings and ordered Judge Fant to issue a Temporary Restraining Order restraining Relators from interfering with the showing of the motion picture (*but not prohibiting Relators from making further arrests)*

until such time as there had been a "judicial determination of the issues". Pursuant to the order of the Louisiana Supreme Court, a Temporary Restraining Order was issued with a rule directed to Relators to show cause on Tuesday, October 9, 1973, why a preliminary or permanent injunction should not be issued against Relators. Relators then filed a reconventional demand seeking a permanent injunction prohibiting the showing of the obscene motion picture "Last Tango in Paris" and that matter was also scheduled for hearing on October 9, 1973.

On October 9, 1973, the trial of the case to determine the obscenity, vel non, of the motion picture began, with both sides being represented by counsel and all necessary witnesses being available. (The Trial Judge, Judge James E. Clark, had advised that each side would be limited to twelve witnesses, in addition to any of the parties.)

At the beginning of the trial, Court was recessed and adjourned to the Don Theatre in Shreveport where Judge Clark viewed the movie "Last Tango in Paris" in its entirety and from beginning to end. After viewing the movie, Court was resumed with Relators going forward. The testimony of the witnesses called by Relators was to the effect that this movie was definitely obscene. Additionally, after Judge Clark viewed the movie, it was filed in evidence in the Trial Court as part of Relator's case and is part of the record herein. *Relators specifically request that this Honorable Court view the film.*

In proving Relator's case, and carrying their burden of proof, Relators presented the testimony of numerous witnesses who testified that they had viewed the movie and believed the movie to be obscene in that it portrayed and depicted sexual conduct in a patently offensive way, had no serious literary, artistic, political or scientific value and that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest.

The testimony of the numerous witnesses called on behalf of Relators proved that the motion picture dealt exclusively with the sexual encounters of the two main characters in the movie, these sexual encounters being depicted graphically as the actors were engaged in natural and unnatural sex acts. The movie showed "hard core" pornography with profanity being used throughout the movie and particularly during the course of the obscene, sexual encounters between the two main characters.

After hearing all of the evidence, the Trial Court, on Friday, October 12, 1973, at approximately 8:35 P.M., rendered judgment in favor of Relators decreeing the motion picture "Last Tango in Paris" to be obscene. The Court permanently enjoined the showing of the motion picture entitled "Last Tango in Paris" at any location in Caddo Parish, Louisiana, but the Court did not close the theatre. Respondents then applied to the Louisiana Supreme Court for supervisory writs and a stay order. Writs were granted and the judgment of the Trial Court was stayed and suspended.

As a result of the order of the Louisiana Supreme Court, the motion picture which had been decreed obscene after a full evidentiary hearing continued to be shown and exhibited in Shreveport in violation of law.

The Supreme Court of Louisiana then reversed the Trial Court and held the provisions of R.S. 13:4711 et. seq. to be unconstitutional and further stated that the provisions of R.S. 14:106 were unconstitutional for the reasons outlined by the Supreme Court of Louisiana in its decision handed down in *State of Louisiana v. Shreveport News Agency, Inc.*, infra. See Appendix J. Relators then timely applied for rehearing in the Supreme Court of Louisiana but rehearing was refused by that Court on January 11, 1974. See Appendix G.

Relators then applied to the Louisiana Supreme Court for a Stay Order, which was granted and its judgment was stayed until April 11, 1974. See Appendix K. However, this Stay Order was modified by the Louisiana Supreme Court to remain in existence only until February 15, 1974. See Appendix L. Relators then applied to Justice Powell of this Court for a further stay pursuant to 28 USC 2101 (f), but the application was denied.

STATEMENT OF THE CASE IN STATE OF LOUISIANA VERSUS SHREVEPORT NEWS AGENCY, INC.

Respondent herein is a major distributor of obscene books and magazines throughout Northwest Louisiana and maintains its main warehouse in Shreveport, Lou-

isiana. Prior to May 28, 1973, Officers of the Shreveport Police Department came into possession of information that obscene magazines were being distributed by Shreveport News Agency, Inc. in Northwest Louisiana and as a result of this information, an investigation began.

The investigation revealed that Respondent was in possession of numerous obscene and pornographic books and magazines and that these books and magazines were in the possession of Shreveport News Agency with the intent to sell and distribute same to retail dealers in Northwest Louisiana. On May 28, 1973, search warrants were issued by Judge Alexander and Clark of the First Judicial District Court authorizing law enforcement officers to search for and seize obscene books and magazines on Respondent's premises located in Shreveport. The search warrants were based upon Affidavits setting forth in great detail the activities of Respondent, describing the obscene magazines in detail and setting forth probable cause for the issuance of a search warrant.

Upon issuance of the search warrants, law enforcement officers went to Respondent's place of business and seized one copy of the obscene magazines described in the various Bills of Information which were filed against Respondent and which are a part of the record herein. Although Shreveport News Agency, Inc. possessed numerous copies of each of the magazines described in the Bills of Information, law enforcement officers seized only one of each kind.

After the magazines had been seized pursuant to said search warrants, the Bills of Information which are part of the record herein were filed in the Caddo Parish District Court on June 6, 1973. Each Bill of Information charged Respondent with the commission of a separate crime of obscenity.

After the filing of the Bills of Information, Relator filed motions to quash and supplemental motions to quash each charge contending that R.S. 14:106 was unconstitutional. The motions to quash were taken up for oral argument in due course and after argument, Judge John F. Fant ruled that the provisions of R.S. 14:106 were valid and constitutional and that each Bill of Information filed by the State represented a charge for a separate act of obscenity as to each type magazine possessed by Relator with the intent to sell and distribute, *made a preliminary determination that said magazines were obscene*, and the motions to quash were overruled.

Respondent then applied to the Louisiana Supreme Court for supervisory writs and a stay order, all of which were granted by that Court. After argument, the Louisiana Supreme Court ruled that R.S. 14:106 was unconstitutional in light of this Court's decision in *Miller v. California*. See Appendix M. Subsequently, a stay order was entered in this case by the Chief Justice of the Louisiana Supreme Court. See Appendix N.

STATEMENT OF THE CASE IN STATE OF LOUISIANA VERSUS RICHARD LEE McNUTT

On June 1, 1971, officers of the New Orleans Police Department Vice Squad bought four (4) magazines entitled respectively, "Cherry", "Sex Secrets", "Three To Get Ready", and "Movie Goer" from the LeBanque Cinema and Bookstore at 941 Decatur Street. The officers were already familiar with the contents of these magazines, having purchased copies of them a few weeks before. They paid Richard Lee McNutt $27.03 for the four (4) books, advised McNutt that they were police officers, and arrested him for displaying obscene literature.

On June 17, 1971, Richard Lee McNutt was charged in four (4) counts of a Bill of Information with intentionally possessing, selling and exhibiting "lewd, lascivious, filthy and sexually indecent pictures and written compositions, with the intent to primarily appeal to the prurient interest of the average person", to-wit: a magazine entitled "Cherry", a magazine entitled "Sex Secrets", a magazine entitled "Three To Get Ready", and a magazine entitled "Movie Goer", all in violation of the Louisiana Obscenity Statute, R.S. 14:106.

The accused was ultimately tried and found guilty of three counts of Obscenity and sentenced to pay a fine of $500.00 or to serve six months in Parish Prison on each of the three (3) counts, the sentences to run concurrently. The defendant then appealed to the Louisiana Supreme Court. That Court reversed the

conviction and sentence, holding that R.S. 14:106 is unconstitutional as a result of this Court's opinion in *Miller v. California* and its companion cases. See Appendix O. The State timely applied for rehearing, but rehearing was refused on January 11, 1974. See Appendix G. Subsequently the Chief Justice of the Supreme Court of Louisiana granted a Stay Order in this case to allow the State to apply to this Court for Writs of Certiorari. See Appendix P.

REASONS FOR GRANTING THE WRITS

As a result of the recisions of the Supreme Court of Louisiana in these cases, Louisiana is left without any law to combat obscenity and hard core pornography, either criminally or civilly. The striking down of the Louisiana Criminal Obscenity Statue and the civil procedural device for its enforcement is clearly contrary to this Court's recent pronouncements dealing with obscenity and pornography. It is submitted that the Supreme Court of Louisiana has misinterpretated and misapplied this Court's holding in *Miller v. California, supra*, and its companion cases when the Louisiana Supreme Court stated that this Court's holding in *Miller mandates* the striking down of the Louisiana Obscenity Statue. It is also respectfully submitted that in striking down the provisions of R.S 13:4711 et.seq., the Supreme Court of Louisiana has misinterpretated and misapplied this Court's decisions in *Heller v. New York, supra*, and *Rhoden v. Kentucky, supra*, and the prior jurisprudence of this Court in the field of so-called "prior restraint" as ap-

plied to obscenity proceedings, and particularly has misapplied and misinterpretated this Court's decisions in *United States v. 37 Photographs*, 91 S.Ct. 1400, *Freedman v. Maryland*, 380 U.S 51, 85 S.Ct. 734, *Tietel Film Corp. v. Cusack*, 390 U.S. 139, *Blunt v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423.

As a result of the misinterpretation and misapplication by the Supreme Court of Louisiana of this Court's pronouncements in the field of pornography and obscenity, the Supreme Court of Louisiana has held R.S. 14:106 and the provisions of R.S. 13:4711 et.seq. to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 2 and 3 of the Louisiana Constitution. The pronouncement by the Louisiana Supreme Court as to R.S. 14:106 is based in full on an interpretation of *Miller v. California* with regard to both the Louisiana and United States Constitutions. There is no distinction made with regard to constitutionality, vel non, with respect to one or the other constitutions. The Louisiana Supreme Court simply finds that if it should follow *Miller*, it would be necessary to legislate. Thus, the Louisiana Supreme Court has substituted for the requirement of *Miller* the need for judicial legislation rather than this Court's plain requirement for "interpretation". And the Louisiana Supreme Court finds it has no power to legislate under the Louisiana Constitution. Needless to say, there is no state constitution in the United States which permits a State Court to legislate.

CONSTITUTIONALITY OF R.S. 14:106

The Supreme Court of Louisiana has now declared that "The United States Supreme Court Pronouncement in *Miller v. California* has made our Statute unconstitutional." Relators submit that this is error and this Court should grant writs of certiorari herein in order to correct the misinterpretation placed upon this Court's decision in *Miller v. California* by the Supreme Court of Louisiana.

The crime proscribed by Article 106 of the Louisiana Criminal Code is obscenity:

> "A. Obscenity is the intentional:
>
> (1) . . .
>
> (2) Production, sale, exhibition, gift or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, storypaper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed, or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person.

(4) . . ."

As held in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966) and affirmed in the *Miller* case, obscene material is not protected by the First Amendment of the United States Constitution and the States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of "public accommodation", *Paris Adult Theatre I v. Slayton*, 93 S.Ct. 2628 (1973).

In *Miller* this Court "undertakes to formulate standards more concrete than those in the past" and reviews *Roth* and *Memoirs* pointing out:

(a) that in *Roth* the Court sustained conviction under a Federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. 93 S.Ct. @ 2613. Relators here invite special attention to the fact that the Court found it necessary to repeat only the statutory language contained in the Louisiana Statute (not statutory language of the type and specificity the Supreme Court of Louisiana re-

quires in its holding of unconstitutionality. See also the *United States v. 12 200 Ft. Reels of Super 8MM Film*, 93 S.Ct. 2665 (1973) wherein the Federal Statute under construction is even broader.

(b) that in *Roth* it was decided:

> "... There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 93 S.Ct. @ 2613.

(c) that in *Memoirs* "the Court veered sharply away from the *Roth* concept and (with only a plurality) articulated a new test of obscenity" ...

> "(a) the dominant theme of the material taken as a whole appeal to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of

> sexual matter; and (c) the material is utterly without redeeming social value." *Ibid.*

(d) that the difference in *Roth* and *Memoirs* lies in the third (c part) requirement of *Memoirs:*

> "*Roth* presumed obscenity to be utterly without redeeming social value" (and) *Memoirs* required that to prove obscenity it must be affirmatively established that the material is 'utterly without redeeming value'." ... calling "on the prosecution to prove a negative, i.e. that the material was 'utterly without redeeming social value' — *a burden virtually impossible to discharge under our criminal standards of proof.*" (Emphasis supplied) *Ibid.*

With this background, by a majority, and with at least the thought in mind of making it possible for a prosecutor to meet his burden of proof, this Court reduced the third requirement of *Memoirs* and announced with respect to State statutes designed to regulate obscene materials:

> "... we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed. A state offense must also be limited to works which,

> taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value". 93 S.Ct. @ 2614-15.

This Court then goes on to describe "the basic guidelines for the trier of fact . . .":

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, *supra*, 408 U.S., at 230, 92 S.Ct., at 2246 (1972), quoting Roth v. United States, *supra*, 354 U.S., at 489, 77 S.Ct., at 1311 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 93 S.Ct. @ 2615.

Finally the Court gives "a few plain examples" of what state statutes may define for regulation:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

The Supreme Court of Louisiana holds that the Louisiana Statute does not meet the test of *Miller*. Relators submit, however, that the obscenity statute of California under scrutiny by this Court in *Miller* does not meet the 1, 2, 3 test either and, significantly, the Court DID NOT declare the California statute unconstitutional. Instead, it remanded the case to California for further proceedings, causing Mr. Justice Douglas to opine in dissenting opinion that the way is open for California to send a man to prison for obscenity under "freshly written standards" (not a complait of ex post facto treatmet but rather the complaint by Mr. Justice Douglas of failure of notice, vagueness, or the like). The Louisiana Supreme Court apparently holds the same; saying that the Louisiana Statute fails to define specific sexual conduct subject to prosecution, fails to state that the work depict or describe sexual conduct in a "patently offensive way", and fails to state that the work, "taken as a whole, lacks serious literary, artistic, political or scientific value".

That the California Statute does not comport with such a requirement for exactitude is apparent from examination of the statute (f.n. 1, 93 S.Ct. @ 2611). It *does not* proscribe any "specific sexual conduct". It *does not* denounce only sexual conduct presented in a "patently offensive way". It does state, after the pattern of *Memoirs*, that matter to be obscene "taken

as a whole (be) utterly without redeeming social importance".

In construing this statute in light of *Miller* and to answer the question: "Does California still have an obscenity Statute?" the Court of Appeal, Second District of California answered: Yes. *People v. Enskat*, App., 109 Cal. Rptr. 433 (Aug. 1973). In so holding, the California Court provides a complete and convincing analysis:

First, the United States Supreme Court made it clear that the California Statute and like statutes are not unconstitutional. In *Miller*, f.n. 6, S.Ct. 2615 this Court says:

> "... We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, *as construed heretofore or hereafter, may well be adequate.*" See *United States v. 12 200 Ft. Reels of Film*, n. 7, 93 S.Ct. 2665 (1973)

In *Miller*, this Court cited the Oregon and Hawaii obscenity statutes with some approval in f.n. 6 (93 S.Ct. @ 2615) with special reference to "specifically defined sexual conduct." However, in *United States v. 12 200 Ft. Reels of Film, supra*, in construing a Federal Statute which condemns importation into the United States

from any foreign country "... any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing ... or other article which is obscene or immoral ..." (a statute containing none of the definitive elements of obscenity required by the Louisiana Supreme Court) and refused to declare that statute unconstitutional the Court noted:

> "If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent' or 'immoral' as used to describe regulated material in 19 U.S.C. Sec. 1305 (a) and 18 U.S.C. Sec. 1462, see *United States v. Orito*, 93 S.Ct. at p. 2676 (1973), we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller v. California, supra.*" f.n. 7 of *12 200 Ft. Reels* @ 2670. (Emphasis Added)

Thus, this Court is prepared to supply an interpretation to fulfill *Miller* in connection with the Federal Statute in *12 200 Ft. Reels* which contains no more for description than the word "obscene" and is prepared to do likewise in connection with the Federal Statute considered in *Orito* which contains the language of the Louisiana Statute, to-wit: "obscene, lewd, lascivious, or filthy". Not only is this Court prepared to provide the *Miller* examples of proscribed conduct for Federal

Statutes, it equates the example to "patently offensive representations".

Relators submit that no more is needed to show the misinterpretation of *Miller* by the Louisiana Supreme Court, but there is more.

The second point made in *Enskat* is that the California Courts have "authoritatively construed" sexual conduct so as to limit the reach of the statute to "specifically defined sexual conduct" (though none is found in their statute), citing cases. See 109 Cal. Rptr. 438 et seq. In Louisiana the same is true. See interpretations and limitations supplied in *Louisiana v. Gulf States Theatres, Inc.*, 270 So.2d 562 (1963) and *State v. Gay Times, Inc.*, 274 So.2d 162 (1973). According to the Louisiana Supreme Court, however, both of the cases require reversal because of this Court's holding in *Miller*.

The third point in *Enskat* deals with easing of prosecutorial burden in obscenity cases.

Again, the *Miller; 12 200 Ft. of Film, Orito Enskat* answers to the holding of the Supreme Court of Louisiana more than suffice to sustain the validity of Louisiana's obscenity Statute. But, the Court's attention is invited also to the treatment given by other states to their obscenity statutes since the decision in *Miller*, and with special reference to its pronouncements:

(a) Massachusetts: *Commonwealth v. Claflin*, 298 N.E. 2d 888 upholds the constitutionali-

ty of the Massachusetts Statute against the claim that it contains "no clear standards by which obscenity may be judged". The Statute contains less than Louisiana's Statute, providing only that "whoever ... sells or distributes a pamphlet ... or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture ... for the purpose of sale ... shall be punished ..."

(b) Ohio: *Ohio Ex Rel v. Keating*, 301 N.E. 2d 880 (1973). upholds the constitutionality of the Ohio Statute, in light of *Miller* on remand from the United States Supreme Court, remand having been ordered for "further consideration in light of *Miller*", and the other recently decided cases. The Court's opinion does not provide the language of the Statute, instead the Court furnishes its "interpretation" of the statute prior to the appeal to the United States Supreme Court *in the Keating case.*

(c) Florida: *Rhodes v. Florida*, 283 So.2d 351 (1973), upholds the constitutionality of a statute which, from the Court's opinion, appears identical to the Louisiana Statute.

(d) Washington: In *Washington v. J.R. Distributors*, 512 P.2d 1049 (1973) the Court "authoritatively construed" the word "obscene" to meet the tripartite *Miller* test.

It is apparent, then, that Louisiana is in the minority of states and that the Supreme Court of Louisiana has misinterpreted the pronouncements of this Court in *Miller v. California*. The result reached by the Supreme Court of Louisiana destroys any prohibition against the dissemination of pornography in the State of Louisiana and the Louisiana Statute is ineffective while Federal Statutes providing no more in the way of specificity than does the Louisiana Statute remain in full force and effect.

It is respectfully submitted that writs should be granted herein in order that this Court may further clarify its decision in *Miller* and alleviate the apparent misinterpretation of that original opinion by the Supreme Court of Louisiana.[1]

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[1]In the opinions of the Louisiana Supreme Court complained of by Relators herein, the Louisiana Supreme Court did not pass upon the obscenity, vel non, of "The Stewardesses", "Last Tango in Paris" or the picture magazines made the subject of the prosecutions in State vs. Shreveport News Agency, Inc. and State v. McNutt. It is for this reason that Relators have not dwelt herein with the obscenity of the films and magazines. However, Relators point out that the motion picture "The Stewardesses", which deals in disconnected sequences with the off-duty lives of airline stewardesses, where the pursuits of these young women refer exclusively to their sexual encounters, showing them engaged in acts of fornication, lesbianism, masturbation and even, in one sequence, as the partner in an act of sadism, has been held obscene by the trial court and by the Louisiana Supreme Court in its previous opinions (See Appendix B and D.). Also, the motion picture "Last Tango in Paris", which deals exclusively with the sexual encounteres of the two main characters in the movie, these sexual encounters being depicted graphically as the actors are engaged in natural and unnatural sex acts, showing hard core pornography and engaging in the use of profanity throughout the movie and particularly during the course of the ob-

THE CONSTITUTIONALITY OF R.S 13:4711 ET. SEQ.

Even though the Louisiana Supreme Court found the provisions of R.S. 13:4711 et.seq. to be constitutional just a few months ago, (See State v. Gulf States Theatres of Louisiana, Inc. et al, Appendix D) nevertheless, in its latent opinions in "Tango" and "The Stewardesses", that Court now finds the same statutes to be invalid basing its decision on the prior jurisprudence of this Court. It is submitted that the Louisiana Supreme Court is in error in failing to uphold the validity of those statutes.

There seems to be little doubt throughout the nation that indecency in the form of public lewdness can be prohibited by civil action to abate public nuisances. See, for example, *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, 159 P. 464 (1916); *People v. Lim*, 18 Calif. 2d 872, 118 P.2d 472 (1941).

Many states have enacted public nuisance abatement statutes, Louisiana being only one of many states that provide more than a criminal remedy to prohibit the distribution of obscenity.

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scene, sexual encounters between the two main characters, has been held to be obscene by the trial court under the standards set forth by this Court in *Miller v. California* (See Appendix I). In State v. McNutt, the picture magazines which dwelt throughout with the sexual endeavors of the persons depicted therein were held to be obscene by the trial court in which that case was tried. Additionally, in State v. Shreveport News Agency, Inc., a preliminary determination of obscenity was made by the trial court in ruling upon Respondents' Motion to Quash in that case.

In the cases at bar, we submit that the procedure followed by Relators was constitutionally proper and that the statutes presently under consideration are constitutional "on their face" and as applied to Respondents.

The Louisiana Supreme Court now seems to say that the state can impose absolutely no prior restraint, however short, upon the exhibition of motion picture films. It is submitted that this is in error.

In *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, the issue of prior adversary hearings was presented. In this case the Maryland State Court had ruled as constitutional the provisions of a Maryland motion picture censorship statute making it unlawful to exhibit a motion picture without having previously obtained a license. On appeal, this Court reversed, holding that in a noncriminal proceeding, which required the prior submission of a film to a censor, the censor will avoid constitutional infirmity only if the following requirements are met:

1. The state must bear the burden of proof that the film is obscene.

2. The exhibitor must be assured by statute or by *authentic judicial construction* that the censor will, within a specified brief period, either issue a license or go to court to restrain showing of the film.

3. Any restraint imposed in advance of a final judicial determination on the merits must be limited to the shortest fixed period compatible with sound judicial resolution.

4. The procedure must assure a prompt final judicial decision.

In *Tietel Film Corporation v. John F. Cusack*, 390 U.S. 139 (1968) this Court was again faced with the issue of a prior adversary hearing. In that case, the Chicago Motion Picture Ordinance enjoined the defendants from showing motion pictures alleged to be obscene. The court relied upon *Freedman v. Maryland, supra*, and again held that to be saved from constitutional infirmity, the censor would be required to either issue a license "within a specific brief period" or go to court to restrain showing of the film. The Court said that the procedure must assure a prompt final judicial decree to minimize the deterent effects of an interim and possibly erroneous denial of a license. Again, in *Blunt v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423, this Court dealt with the provisions of the postal laws designed to control the mailing of obscene material. Under these postal regulations an administrative order restricting the use of the mails became effective without judicial approval. These provisions were held to be improper, the Court again relying upon *Freedman v. Maryland, supra.*

In *United States v. Thirty-seven Photographs*, 91 S.Ct. 1400, this Court again considered the problem of prior restraints on materials which were alleged

to be obscene. Again citing *Freedman v. Maryland* and *Tietel Film Corporation v. Cusack*, it was held that any restriction imposed in advance of a final judicial determination on the merits of obscenity must be limited to the shortest fixed period compatible with sound judicial resolution and that the proceedings must be assured of a prompt final judicial decision. In *Thirty-seven Photographs*, this Court set forth certain constitutional time limits for commencement of the proceedings, saying that a period of fourteen days would not be too long within which to commence such proceedings.

In all of these cases, it has been recognized that prior restraint is permissible and this Court has struck down procedures applying prior restraint *only* when the prior restraint has been *arbitrary* and without reasonable assurance of a *speedy judicial determination* on the merits of the material's obscenity or lack thereof. This was recognized in *Delta Book Distributors v. Cronvich*, 304 F.Supp. 662, the Court there stating:

> "It is apparent that there must be some permissible prior restraint, be it however subtle, if obscenity is not protected by the First Amendment and state attempts to regulate it are to be enforcible."

See also *Grove Press, Inc. v. City of Philadelphia*, 418 Fed. 2d 82; *Freedman v. Maryland, supra.*

We also refer this Honorable Court to *ABC Books, Inc. v. Benson*, 315 Fed. Supp. 695 (1970) wherein a

Three Judge District Court in Tennessee considered certain Tennessee statutes which were both criminal and civil and which are procedurally exactly like the Louisiana statutes under consideration.

In *ABC Books* it was argued that the Tennessee statutes were unconstitutional because no prior adversary hearing was required prior to the issuance of an *ex parte temporary injunction.* The court fully considered these claims, yet held the Tennessee statutes to be *constitutional.* Because of the similarity between the Tennessee statutes and the Louisiana statutes and the factual context involved in these cases, we quote at length from the court's opinion wherein it was stated, commencing at page 698:

> "Plaintiffs also urge that T.C.A. §§ 39-3003 and 39-3005, the civil injunction obscenity statute, are unconstitutional on their faces for failure to specifically provide for a prior adversary hearing on the question of obscenity before the dissemination of allegedly obscene materials is disturbed by criminal prosecution or by seizure or suppression, and, ergo, constitute a "prior restraint" and exert a "chilling" effect on the exercise of First Amendment freedoms. See Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).
>
> "While the protection against prior restraint is an important right, it is not an absolute one. In Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441, 77 S.Ct. 1325, 1328, 1 L.Ed.2d 1469 (1957),

the Court, relying in part on Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), pointed out that protection even as to previous restraint is not unlimited. The Court said: "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test."

"In Smith, supra, 361 U.S. at 154, 80 S.Ct. at 219, the Court was more specific when it said: "Doubtless any form of criminal obscenity statute ... will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene ..." T.C.A. § 39-3003 specifically provides that it "... shall not be construed to permit the seizure or suppression of any material, obscene or otherwise, such seizure or suppression to be lawful only as expressly provided for by law." Neither it nor T.C.A. § 39-3005 prohibit an adversary hearing when constitutionally required prior to either criminal prosecution or seizure or suppression.

"When a statute may be constitutionally applied or enforced, that statute must be upheld against a claim of constitutional infirmity on its face. Gable v. Jenkins, 309 F.Supp. 998, 1001 (N.D.Ga. 1969); Rage Books, Inc. v. Leary, 301 F.Supp. 546, 548 (S.D.N.Y. 1969); and Stein v. Batchelor, 300 F.Supp. 602, 608 (N.D.Texas 1969). Whatever the constitutional requirements may be insofar as prior adversary hear-

ings are concerned, they are implied in the statutes. Grove Press, Inc. v. Kansas, 304 F. Supp. 383, 390 (D.Kansas 1969).

"Accordingly, we hold that the absence of a provision for an adversary hearing before criminal prosecution or seizure or suppression does not invalidate these statutes.

"It is further asserted that these two statutes are fatally defective on their faces because they authorize the issuance of an ex parte temporary injunction without providing for notice and a prompt judicial determination of the obscenity vel non of constitutionally suspect materials, thus constituting "prior restraints" on the exercise of First Amendment rights. T.C.A. § 39-3003 provides that, where a temporary injunction is issued under its provisions, an adversary hearing shall be held within two days after joinder of issues, "... at which hearing the court will determine whether or not the material in question is, in fact, obscene." T.C.A. § 39-3005 makes mandatory, where a temporary injunction has been issued, a hearing within two days after joinder of issues and a decision by the court within two days after conclusion of the trial.

"This court recognizes that neither of the statutes includes a provision for notice before the issuance of the temporary injunctions provided for therein. These provisions do constitute

some prior restraint, although the restraint is not unlimited. The seriousness of such restraint was recognized by the Supreme Court in Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963), when it said that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Prior to the decision in Bantam Books, Inc., The Court had, in Kingsley Books, Inc., supra, sustained, against a like attack, a New York statute which authorized an ex parte temporary injunction and required a trial within one day after joinder of issue and a decision within two days after the conclusion of the trial.

"Subsequent to the decisions in Bantam Books, Inc., supra, the Court in Freedman v. Maryland, 380 U.S. 51, 58, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 (1965) authorized some limited prior restraint, saying:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. ... Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the short-

est fixed period compatible with sound judicial resolution.

"It is contended here that, to the extent that Freedman, authorizes a temporary injunction prior to an adversary hearing, it is modified by Carroll v. President and Commissioners of Princess Ann, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968), in which it was held that a Maryland court could not constitutionally issue a temporary injunction restraining the holding of a political rally without a prior adversary hearing where it appeared that the persons who were the object of the injunction were available for notice and hearing. We consider it important that, in Carroll, the Court was dealing with the First Amendment right of free speech with regard to obscenity. This distinction was noted in Carroll, 393 U.S. at page 182, 89 S.Ct. at page 352, when the court said:

"In the present case, the reasons for insisting upon an opportunity for hearing and notice, at least in the absence of a showing that reasonable efforts to notify the adverse parties were unsuccessful, are even more compelling than in cases involving allegedly obscene books. The present case involves a rally and 'political' speech in which the element of timeliness may be important. As Mr. Justice Harlan, dissenting in A Quantity of (Copies of) Books v.

(State of) Kansas, (378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809) pointed out, speaking of 'political and social expression':

" 'It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is of constant but rarely particularly topical interest.' "

We conclude that Carroll did not modify Freedman as asserted here.

Tietel Film Corp. v. Cusack, 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968), relied on by plaintiffs, is easily distinguished. The ordinance there found invalid, a movie censorship ordinance, provided for from fifty to fifty-seven days for the completion of the administrative process before initiation of the judicial proceeding. As the Court said therein, there was no provision which would assure a prompt judicial decision of the question of the alleged obscenity of the film.

"It is our opinion that the Tennessee statutes, T.C.A. §§ 39-3004 and 39-3005, sufficiently limit the preservation of the status quo prior to an adversary hearing and final judicial determination of the question of obscenity, as re-

> quired by Freedman, and, accordingly, we uphold these statutes against this attack. In so holding, we also necessarily hold that, since it is constitutionally permissible for the Tennessee statutes to authorize such a limited temporary injunction, there is no necessity for a provision for notice in the statutes."

These Tennessee statutes were again upheld by the Supreme Court of Tennessee in *Art Theatre Guild Inc. v. State Ex Rel Rhodes,* 469 SW 2d 669.

Also, in *Milkyway Production, Inc. v. Leary,* 305 F. Supp. 288 (1969) which was affirmed by this Court on February 27, 1970 at 90 S.Ct. 817, it was again held there was no constitutional requirement for a prior adversary hearing on the issue of obscenity.

It is submitted that R.S. 13:4711 et. seq. meets the requirements imposed by this Court in *Freedman v. Maryland, Tietel Film Corporation, Blunt and Thirty-seven Photographs, supra.*

In interpreting these statutes in *State v. Gulf States Theatres of Louisiana, Inc. et al,* 264 La. 44, 270 So.2d 547, the Louisiana Supreme Court made it clear that although some prior restraint is authorized under the cases set forth above, such prior restraint cannot be imposed arbitrarily and cannot be imposed without the exercise of judicial discretion exercised by an independent Judge or Magistrate. In that case, the Louisiana Supreme Court stated:

"... The statute requires that the petition alleged the existence of a "nuisance" and that it may be verified by the District Attorney. This makes it necessary for the Trial Judge to determine, on the basis of the facts alleged, whether "obscenity", as defined by Article 106 of the Criminal Code, is "carried on" before he issues an injunction. If the allegations and the accompanying affidavit do not, in the Judges opinion, recite facts which warrant a conclusion that a "nuisance" is being "carried on" then the prerequisites to the issuance of the injunction have not been satisfied and the Judge *must not* sign the temporary injunction. On the other hand, if the allegations of the petition and the accompanying affidavit do set forth, in the *Judge's opinion,* that a "nuisance" is being carried on, then, and in that event, he "shall" issue the temporary injunction."

"*Under this view a great deal of discretion is left to the Trial Judge for a judgment on his part must be made.* He must ascertain from the petition and accompanying affidavit whether the facts set out fulfill those elements of the law which, taken together, constitute a "nuisance". For instance, in this case, the petition must allege that the film must have been, and is being, exhibited with intent to primarily appeal to the prurient interest of the average person. And it must be lewd, lascivious, filthy or sexually indecent."

> *"It is not mandatory that the Judge sign every petition placed before him whether it is properly supported by the facts or not.* We doubt that any Trial Judge so construes this statute. *He "shall" sign only those injunctions which are supported by a sworn petition which alleges facts which constitute "nuisance". This is what occurred in this case.* In the petition which he presented the District Attorney alleged in detail the exhibition of the movie, the location of the theatre in close proximity to a public elementary school and a Baptist church; that the movie was viewed by many people and that the movie was lewd, lascivious, obscene and sexually indecent and, as a whole, appealed only to prurient interests, and that it would be and it was without any redeeming social value whatever, *particularly describing the details of the movie* ..." (Emphasis supplied)

It is apparent that these statutes do not authorize arbitrary prior restraint. Additionally, the statutes impose the burden of proof upon the *plaintiffs,* even though the statute provides that the trial and adversary hearing on the merits of the obscenity of the materials will be conducted on "rule days" of the Trial Court. This "rule to show cause" language was included in the statutes in order that there may be a *speedy judicial determination,* rather than allowing the trial on the merits to be conducted at a later time as might be the result under "ordinary process" which, in Louisiana, would require a *minimum* delay of fifteen days.

These statutes also provide for a prompt judicial decision after a trial on the merits on the question of the obscenity of the film. In the instant cases the trial judges rendered their decisions *immediately* following the close of evidence and *at the earliest possible time.* See *State v. Gulf States Theatres of Louisiana, Inc. et al, supra,* Appendix D. It is also apparent that speedy appellate review of these cases has been provided in these cases.

The statutes under consideration do not mandatorily require the closing of any premises where a "nuisance" is found to exist. This is a matter left entirely to the sound judicial discretion of the trial court and the appellate courts of Louisiana and each case must be decided on its own merits. In the instant cases, the buildings have not been padlocked and *Respondents have been in business operating the Broadmoor Theatre and Don Theatre continually since these proceedings were instituted.*

It should be noted that in striking down these statutes, the Louisiana Supreme Court did not refer to this Court's latest *procedural* pronouncements in the field of obscenity which were set forth in *Roaden v. Kentucky, supra,* and *Heller v. New York, supra.* However, Relators submit that these statutes are also constitutional under those decisions.

First, *Roaden v. Kentucky* was a criminal case (which these cases are not) involving the applicability of the general rules of search and seizure authorizing the seizure of evidence incident to a valid arrest. In

Roaden, no judge or court ever took any action whatever. The local Sheriff, on his own, merely seized a film incident to the arrest of the manager of a drive-in movie for the crime of obscenity. There was no warrant, no affidavit setting forth facts and no court order. We submit that *Roaden* is *not* the case at bar.

We submit that this Court's opinion in *Heller v. New York* stands for the proposition that in criminal cases no adversary hearing is required prior to the issuance of a constitutionally valid search warrant authorizing law enforcement officers to search for and seize obscene film. In *Heller,* this Court again cites with approval *United States vs. Thirty-seven Photographs, supra, Tietel Film Corporation v. Cusak, supra,* and *Freedman v. Maryland* and stated that an *initial* and *temporary* seizure was not prohibited provided that a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship. In "The Stewardesses" the temporary injunction does not involve an attempt at total suppression or destruction, but involves a legitimate attempt to prevent the dissemination of obscenity and the statutes under consideration insure the distributor of a prompt trial of all the issues within five days from the date of filing suit. As stated heretofore, in "Last Tango in Paris" no temporary injunction ever issued.

We respectfully submit that Louisiana Revised Statutes 13:4711 et seq. is constitutional *on its face* as applied to obscenity and vulgarity and that in the instant cases the statutes were *constitutionally applied* to enjoin the showing of a *particular obscene movie* in each

case. Respondents were given constitutionally adequate protection of their First Amendment rights. In "The Stewardesses", these First Amendment protections were:

1. Before the issuance of a temporary injunction, affidavits were presented to a District Court Judge alleging in *great detail* the obscene nature of the movie and the Trial Judge was able to make a *judicial determination* that a temporary injunction should issue.

2. The temporary injunction remained in effect for a period of five days as to *this obscene movie only*, with Respondents place of business being allowed to continue to operate with "business as usual", the only exception being that the obscene movie "The Stewardesses" was not shown.

3. At the trial on the merits which was conducted within five days, the burden of proof was upon the plaintiffs and that burden of proof was maintained.

4. The decision by the trial court that the movie was, in fact, obscene was handed down at the conclusion of the trial, on the same day thereof and within five days from the date of the filing of the original suit.

5. Respondents were granted an appeal to the Louisiana Second Circuit Court of Appeal as a matter of right.

6. The theatre itself has not been closed but has, as stated above, continually operated since the date of filing of the suit.

In "Last Tango in Paris", Respondents were afforded the same procedural safeguards as listed above, but Relators *did not seek* a *temporary injunction* and at the conclusion of the proceedings in the trial court, writs were granted by the Louisiana Supreme Court within a few days time.

In light of all the above, we respectfully submit that there are adequate procedural safeguards to protect the rights of Respondents herein and that this Honorable Court should grant writs of certiorari in these cases in order to resolve these important legal issues.

CONCLUSION

It is submitted that the decisions of the Supreme Court of Louisiana rendered in these cases are not in accord with the recent pronouncement of this Court in the field of obscenity. Further, it is submitted that the decisions rendered in these cases indicate that confusion still exists in the field of obscenity and pornography and that this Court shoud grant Writs herein in order to further clarify this important area of the law.

For the reasons set forth in the Petition herein, is respectfully urged that this Petition for Writs of Ce tiorari be granted.

Respectfully submitted,

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BARBARA RUTLEDGE
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LOUISE KORNS
Assistant District Attorney

Counsel for Petitioners

CERTIFICATE

This is to certify I have this day served upon opposing counsel the within and foregoing Petition for Writs of Certiorari to the Supreme Court of Louisiana, by mailing two (2) copies thereof, postage prepaid, to Wilkinson, Carmody & Peatross, 1708 Beck Building, P.O. Box 1707, Shreveport, Louisiana 71166; Breazeale, Sachse & Wilson, 701 Fidelity National Bank Building, Baton Rouge, Louisiana; Stone, Pigman, Walther, Wittmann & Hutchinson, 1000 Whitney Bank Building, New Orleans, Louisiana 70130; Robert J. Donovan, Jr., Suite 1212, Mid South Towers, Shreveport, Louisiana; and Mr. Michael Silvers, Suite 1150, Commerce Building, 821 Gravier Street, New Orleans, Louisiana 70112, this ____ day of March, 1974.

OF COUNSEL

APPENDIX A

LOUISIANA REVISED STATUTES 13:4711 ET. SEQ.

§ 4711.

Any building, structure, land, watercraft or movable in or upon which or any part of which assignation, prostitution or obscenity, as now defined or as may hereafter be defined by the criminal laws of this state, is carried on, conducted, continued or permitted or exists, and the furniture, fixtures, equipment and musical instruments, television receivers, phonograph or voice recording devices, written or printed compositions, books, magazines, newspapers, story papers, writings, phonograph records, pictures, drawings, motion picture films, figures or images therein and other contents thereof are declared to be nuisances and shall be enjoined and abated as provided in R.S. 13:4711 through R.S. 13:4717. The owner of any building, structure, land, watercraft or movable, and the officers of any corporation which is the owner, and the agent, representative and employee of any owner, and the lessee, sublessee or other occupants of any building, structure, land, watercraft or movable in or upon which, or any part of which, assignation, prostitution or obscenity, as now defined or as may hereafter be defined by the criminal laws of this state, is carried on, conducted, continued or permitted, or exists, shall be guilty of maintaining a nuisance, and shall be enjoined as provided in R.S. 13:4711 through R.S. 13:4717.

Amended by Acts 1970, No. 451, § 1.

§ 4712.

Whenever a nuisance is carried on, conducted, continued or permitted or exists, as defined in R.S. 13:4711

through 13:4717, the district attorney in the name and on behalf of the parish and without the payment of any costs, the sheriff or the parish governing authority through its parish attorney or other designated representative, in the name and on behalf of the parish and without the payment of any costs, any corporation or association formed in this state for the suppression of vice, and any citizen of the parish may maintain in a court of competent jurisdiction an action to enjoin and abate the nuisance perpetually. Such action may also seek to enjoin the lessee, sublessee or other occupant or inmate from carrying on or conducting the same anywhere within this state, and may seek to enjoin the owner or the officers of any corporation which is the owner or agent of the building, structure, land or other place in or upon which or in or upon any part of which the nuisance exists, from permitting the continued existence of the nuisance. Upon the presentation of the petition for injunction alleging that the nuisance exists, verified by the affidavits of at least two persons, or verified by the affidavit of the district attorney or other parish official hereinabove designated on information and belief, the judge, during term or in vacation, shall grant a temporary injunction without bond. Such temporary injunction shall have the effect also of restraining and enjoining the removal of any personal or other movable property on the premises, and shall issue a rule nisi, returnable in five days, and a hearing shall be had thereon and judgment rendered during term or in vacation. No action shall be brought under R.S. 13:4711 through 13:4717 by any one other than the district attorney or other parish official hereinabove designated until the applicant has obtained

from the judge of any district court a certificate that in the opinion of the judge the applicant is acting in good faith and not for any improper purpose. An action for injunction filed by a citizen or citizens under the provisions of R.S. 13:4711 through 13:4717 shall not be dismissed except upon motion accompanied by the sworn statement made by petitioner and his attorney setting forth the reasons why the action should be dismissed. This motion shall be tried contradictorily with the district attorney or other parish official bringing the action and with all other parties plaintiff, if any, and if the court is of the opinion that the action ought not to be dismissed, the district attorney or other party or parties plaintiff, if any, shall prosecute it to judgment. If the action is not tried within thirty days from the return day, unless failure to try it was caused by circumstances beyond the control of the petitioner or petitioners and the time is extended by the court, the clerk of the court in which the action is pending shall give formal notice to the district attorney or other parish official bringing the action, who shall prosecute the action to judgment.

Amended by Acts 1968, No. 362, § 1.

§ 4713.

Any violation of the provisions of any injunction issued in a cause instituted under the provisions of R.S. 13:4711 through 13:4717 shall constitute a contempt of court, and a party found guilty of such contempt shall be punished by a fine of not less than fifty dollars or more than two hundred and fifty dollars, or by imprisonment in the parish prison for a period of not less than thirty days nor more than six months, or

by both fine and imprisonment. On conviction for a second contempt the offender shall be punished by both fine and imprisonment. Any fine for contempt levied against any owner of a building, structure, land or other place, or against the agent or such owner, or against any officer of a corporation which is the owner, under the provisions of R.S. 13:4711 through 13:4717, shall constitute and become a special lien and privilege on and against the building, structure, land or other place, with priority over all other claims whatsoever, except state, parish, municipal and special taxes and assessments, and may be enforced and collected by the seizure and sale of the building, structure, land or other place in the manner provided for the sale of real property under execution of judgments. Any fine for contempt levied against any lessee, sub-lessee or other occupant of any building, structure, land or other place under the provisions of R.S. 13:4711 through 13:4717 shall constitute and become a special lien and privilege on and against the furniture, fixtures, equipment and musical instruments therein and other contents thereof, with priority over the claims and privileges of the landlord, vendor and all other persons whatsoever, and may be enforced and collected by the seizure and sale of the furniture, fixtures, equipment and musical instruments and other contents in the manner provided for the sale of personal property under the execution of judgments. The proceeds of the sale of any property under the provisions of R.S. 13:4711 through 13:4717 shall be applied to the payment of the costs of all proceedings in the action of injunction and abatement and to the fines collected, and the balance, if any, shall be paid to the defendant.

§ 4714.

If the existence of the nuisance be established in an action under the provisions of R.S. 13:4711 through 13:4717, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the effectual closing of the building, structure, land or other place against its use for any purpose for the period of one year, unless sooner released. If any person shall in any manner use a building, structure, land or other place so directed to be closed, he shall be guilty of contempt and punished therefore as provided in R.S. 13:4713.

§ 4715.

If the owner appears and pays all costs of the proceeding and files a bond with surety or sureties, bound in solido, to be approved by the clerk, in the full value of the property to be ascertained by the court, conditioned that he will immediately abate the nuisance and not permit the use of the property, or any part thereof, for the purpose of assignation, prostitution or obscenity, within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises so closed under the order of abatement to be released, but such release shall not affect any action against any person whatsoever. If the bond is given and all costs therein are paid before judgment and order of abatement, the action shall be thereby discontinued as to the building, structure, land or other place, only. In the event such bond is given and the property so released, each day that the property or any part thereof is used for such prohibited purpose during the term of the bond shall warrant a forfeiture of one hundred

dollars under the bond for each day on which the prop
erty is so used, the collection thereof shall be had b
rule taken in the original action against the principa
and sureties thereon, or either of them, and the releas
shall be revoked. No forfeiture under the bond sha
relieve the owner from any prosecution for contemp
and the consequence thereof and the penalty unde
the bond and the penalty for contempt shall be cumula
tive. The release of the property under the provision
of this section shall not release it from any judgmen
penalty, lien or liability to which it may be subjec
by law.

Amended by Acts 1970, No. 451, § 1.

§ 4716.

For issuing notice to the district attorney, sheri
or parish governing authority through its parish attor
ney or other designated representative, as provide
by R.S. 13:4712, the clerk shall be entitled to charg
the same fee as for notice of appointment of curato
ad hoc. For serving this notice the sheriff shall be en
titled to charge the same fee as for serving notice o
appointment of curator ad hoc, and for selling an
property as provided in R.S. 13:4711 through 13:471
he shall be entitled to charge the same fees as he woul
for seizing and selling like property under executio
of judgments. In all actions prosecuted to judgmen
by the district attorney or other attorney, under th
provisions of R.S. 13:4711 through 13:4717, in whic
injunction is granted, he shall receive a fee of twenty
five dollars, to be taxed as costs, and the district attor
ney or other attorney securing a conviction on rule
for contempt under the provisions of R.S. 13:471

through 13:4717 shall receive ten per cent of the fines collected. The net amount of all fines collected on convictions for contempt under the provisions of R.S. 13:4711 through 13:4717 shall be paid over to the public school fund of the parish in which proceedings are had.

Amended by Acts 1968, No. 362, § 3.

§ 4717.

On the hearing in any action filed under the provisions of R.S. 13:4711 through 13:4717 evidence of the general reputation of the building, structure, land or other place or of the defendant or of the occupants thereof or habitual visitors thereto shall be admissible, and judgment may be based on the general reputation so proven.

Acts 1918, No. 47, Sec. 1, as amended.

APPENDIX B

TRANSCRIBED ORAL OPINION OF William J. Fleniken, Judge, First Judicial District Court, Caddo Parish, Rendered June 30, 1971

OPINION OF THE COURT

THE COURT: We have heard the testimony of the witnesses in connection with the matter. We were particularly impressed with the testimony of Doctor Shaw, who has in the course of his studies and in his work seen sex education films and as he explained this, taken in the context those films are made, or these pictures are made, and in connection with the sex education, they are not repulsive and they are not obscene, but when you take them out of context, that is where the difficulty comes in and that is when they come to the point of evading the law.

We have heard the testimony of several witnesses and true enough that in these cases the witnesses that we have heard stating that they were obscene and sexually they were indecent, they were mature men — and we are not saying the others are not mature, but they are younger men, much younger men.

The defense witnesses seem to think that because people know when they go into an X rated movie they can expect to see lewd, lascivious, vulgar pictures, and of course this is generally true, but if this were the case, there could be orgies exhibited that would put some of us to shame, worse than even some of

the stag movies that are peddled illicitly out to the people.

We think that the evidence as a whole shows that there was no plot or story to the movie and that it was merely scenes and acts in the context that made them lewd, lascivious, obscene and sexually indecent, and therefore in the opinion of this Court the dominant theme of this movie, "The Stewardesses" taken as a whole is designed to appeal to sexual prurient interest, and it is offensive and affronts contemporary standards relating to sexual matters and is without any redeeming social value. Its showing therefore is a nuisance and it is the judgment of this Court that an injunction be granted directing the closing of the building, structure and appurtenances located at 4026 Youree Drive, Shreveport, Caddo Parish, Louisiana, known as the Broadmoor Theatre, and perpetually enjoining the defendants from further exhibition of the film known as "The Stewardesses".

MR. CARMODY: May I ask the Court before we are finished what the nature of the judgment is which the Court proposes to sign?

THE COURT: I would hope that counsel would get together and prepare a judgment in order that I could sign it if —

MR. LINDSAY: It was my understanding that the Court was rendering judgment as prayed for and maintaining the permanent injunction —

THE COURT: Injunction — permanent injunction; that is correct.

MR. CARMODY: The permanent injunction against this film or against this theatre doing business for a year?

THE COURT: Against the film and I think that under the law, Mr. Carmody, I will be compelled to maintain it against the property itself.

MR. CARMODY: Well, let me say this, Your Honor, under this statute — and I have expressed my views of this statute — under this statute you have that right, but you don't necessarily have that duty, and I am asking the Court now if the Court is going to hold that only "The Stewardesses" cannot be shown, or if the Court is going to go further than that and padlock the building for a year and make us take the furniture and fixtures out?

THE COURT: I will have to read the Act itself, Mr. Carmody.

MR. CARMODY: Assuming, Your Honor, that you have that right but you don't have to do it. This is what I mean.

THE COURT: If I don't have to lock the premises for a year — assuming that I do not — then the injunction will be exclusively against the showing of this film — a permanent injunction against the showing of the film.

MR. LINDSAY: If we may argue that, Your Honor — The main purpose of the injunction closing the theatre is to ensure that the nuisance will not — or any other nuisance — will not all of a sudden raise its head. We understand that we are dealing in this case with the film "The Stewardesses" but there is no way, if this organization is going to maintain a nuisance, there is no way for us or the citizens or the complainant or the Court to know at any given time what other movie may be shown out there.

THE COURT: I am enjoining these named defendants from the showing of this movie, "The Stewardesses", Mr. Lindsay. If they show any other movie that is obscene in your opinion, you have the same right to come back before this Court, but to close this business for a period of one year to the showing of any business, carrying on any business, without any advance notice, I do not think would be justified at this time.

MR. CARMODY: Then I would understand that the judgment will be limited — the injunctive relief will be limited just to the showing of this particular movie?

THE COURT: The showing of this film. Now, as I say to the District Attorney, if you have another one, come back, and then they know what to expect from the premises itself.

MR. RICHARDSON: Could I ask the Court one question?

THE COURT: All right, sir.

MR. RICHARDSON: Is the Court, in ruling that this injunction should issue, is the Court finding that a nuisance has been created there by the showing of this obscene movie, "The Stewardesses" so that if they come back with another one we could come back with a rule for contempt of the injunction?

MR. CARMODY: No.

THE COURT: No, I am not holding that. I am holding that the showing of the movie is in violation of the statute. Period. Now if they show another movie and you come back in, showing that, then I think that possibly we would be justified in going ahead and doing what you are asking to be done in this case, closing the business for a year.

MR. RICHARDSON: The Court is ruling, then, that there will be a permanent injunction against these defendants from showing the film called "The Stewardesses" anywhere in this area — otherwise you are going to close down the —

MR. CARMODY: At the Broadmoor Theatre. Because it has to be, under the theory that they brought it, that the Broadmoor Theatre was a nuisance.

THE COURT: Well, I am just telling you, Mr. Carmody, if you come back, I am going to close you for a year. You understand?

MR. RICHARDSON: Your Honor, the testimony has shown that this chain operates theatres elsewhere in Shreveport; all they have got to do is go to another place under your —

THE COURT: All you have got to do is to come back into this Court, if it is shown in Caddo Parish, and we will close it down for the year, Mr. District Attorney.

MR. RICHARDSON: They are enjoined from showing "The Stewardesses" anywhere?

MR. CARMODY: No. Let's ge this straight. The Court's ruling, as I understand it, only enjoins us from showing "The Stewardesses" in Caddo Parish.

THE COURT: In Caddo Parish.

MR. CARMODY: For a year.

THE COURT: No. Permanently. Permanently.

MR. CARMODY: Permanently. All right. Now —

THE COURT: But you know what the penalty is going to be if you show another one and come back and if it is shown that it is this same type of film, Mr. Carmody.

MR. CARMODY: Well, Your Honor, we are back where we started. There has to be a determination

that it is obscene; I don't think you can proceed under the statute, and, with all respect, it is going to be my recommendation to my client that we do appeal.

THE COURT: All right.

MR. CARMODY: I want to ask the Court, is it necessary or can I appeal now without a formal judgment having been entered but with the Court's findings having been dictated into the record?

THE COURT: I don't think you can, Mr. Carmody.

STATE OF LOUISIANA
PARISH OF CADDO

I, Hazel Autrey, Official Reporter, First Judicial District Court of Caddo Parish, State of Louisiana, hereby certify that the foregoing typewritten pages constitute a true and correct transcript of the proceedings in the above entitled and numbered cause at the time and place hereinabove set forth.

WITNESS MY HAND, this the eighth day of July, A. D. 1971.

/s/ HAZEL AUTREY
Official Reporter
First Judicial District
Court of Louisiana

APPENDIX C

STATE of Louisiana and Parish of Caddo,
Plaintiffs-Appellees,

versus

GULF STATES THEATRES OF LOUISIANA, INC., et al.
Defendants-Appellants.

No. 11746.

Court of Appeal of Louisiana, Second Circuit.
Nov. 16, 1971.

En Banc. Rehearing Denied Jan. 4, 1972.
Writ Granted Feb. 11, 1972.

Before AYRES, BOLIN and HEARD, JJ.

HEARD, Judge.

This is a devolutive appeal from a judgment permanently enjoining Gulf States Theatres, Inc., Greater Broadmoor Theatres, Inc., Joseph Gianforte, and their agents and employees from showing a motion picture entitled "The Stewardesses" at any and all locations in Caddo Parish, Louisiana.

The State of Louisiana and the Parish of Caddo obtained a temporary restraining order against the showing of this movie pursuant to LSA-R.S. 13:4711-13:4717. A rule to show cause why a final judgment of injunction should not be rendered issued at the same time as

the restraining order. Evidence was taken at the hearing on the rule and judgment of permanent injunction was rendered.

Gulf States Theatres, Inc., et al are asserting in this court that the statute pursuant to which the injunction has issued is unconstitutional as applied to expression. They further assert that the statute is unconstitutional because the title is not indicative of its object. In addition to the attack on the constitutionality of the statute, Gulf States Theatres, Inc., et al assert that the movie is not obscene as that term is defined by the Supreme Court of the United States.

The Constitutionality of the Statute

In general, LSA-R.S. 13:4711 declares any structure in which assignation, prostitution, or obscenity is carried on to be a nuisance. LSA-R.S. 13:4712 provides the procedure for enjoining the nuisance. It reads as follows:

> "Whenever a nuisance is carried on, conducted, continued or permitted or exists, as defined in R.S. 13:4711 through 13:4717, the district attorney in the name and on behalf of the parish and without the payment of any costs, the sheriff or the parish governing authority through its parish attorney or other designated representative, in the name and on behalf of the parish and without the payment of any costs, any corporation or association formed in this state for the suppression of vice, and any citizen of the

parish may maintain in a court of competent jurisdiction an action to enjoin and abate the nuisance perpetually. Such action may also seek to enjoin the lessee, sublessee or other occupant or inmate from carrying on or conducting the same anywhere within this state, and may seek to enjoin the owner or the officers of any corporation which is the owner or agent of the building, structure, land or other place in or upon which or in or upon any part of which the nuisance exists, from permitting the continued existence of the nuisance. Upon the presentation of the petition for injunction alleging that the nuisance exists, verified by the affidavits of at least two persons, or verified by the affidavit of the district attorney or other parish official hereinabove designated on information and belief, the judge, during term or in vacation, shall grant a temporary injunction without bond. Such temporary injunction shall have the effect also of restraining and enjoining the removal of any personal or other movable property on the premises, and shall issue a rule nisi, returnable in five days, and a hearing shall be had thereon and judgment rendered during term or in vacation. No action shall be brought under R.S. 13:4711 through 13:4717 by any one other than the district attorney or other parish official hereinabove designated until the applicant has obtained from the judge of any district court a certificate that in the opinion of the judge the applicant is acting in good faith

and not for any improper purpose. An action for injunction filed by a citizen or citizens under the provisions of R.S. 13:4711 through 13:4717 shall not be dismissed except upon motion accompanied by the sworn statement made by petitioner and his attorney setting forth the reasons why the action should be dismissed. This motion shall be tried contradictorily with the district attorney or other parish official bringing the action and with all other parties plaintiff, if any, and if the court is of the opinion that the action ought not to be dismissed, the district attorney or other party or parties plaintiff, if any, shall prosecute it to judgment. If the action is not tried within thirty days from the return day, unless failure to try it was caused by circumstances beyond the control of the petitioner or petitioners and the time is extended by the court, the clerk of the court in which the action is pending shall give formal notice to the district attorney or other parish official bringing the action, who shall prosecute the action to judgment."

[1, 2] Gulf States attacks this statutory procedure on numerous grounds. Firstly, they argue that it is unconstitutional for the reason that the trial judge presented with a verified petition for injunction has no discretion as to whether or not to issue a temporary injunction. We agree. It cannot be disputed that states may regulate the dissemination and exhibition of obscene material for obscene material does not enjoy the

protection of the First Amendment, But "* * * a State is not free to adopt whatever procedures it please for dealing with obscenity * * * without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri, 367 U.S. 717, 81 S.Ct. 1708, 1716, 6 L.Ed.2d 1127 (1961). We are aware of the United States Supreme Court decision in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957) upholding a New York injunction statute applying to obscenity. However, in that statute the judge presented with the complaint has discretion as to whether or not a temporary restraining order will issue. As stated in *Marcus*, supra:

> "* * * the New York injunctive proceeding [in *Kingsley Books*] was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene. The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place." [81 S.Ct. 1708, 1718]

Under the Louisiana statute in question the judge can exercise no independent check on the judgment of the prosecuting authority. Rather than a judicial mind passing on the relative merits of the petition, the judi-

cial hand is forced by the Legislature to sign a temporary restraining order. The state argues in this case that the judge in fact makes a probable cause determination of obscenity prior to signing the temporary restraining order. While this may be true, the fact that our judges act reasonably cannot rehabilitate a constitutionally defective statute. If there has ever been a term of art in our law, it is the word "shall". It commands, and leaves no room for discretion. We hold, then, that a temporary restraining order forbidding the exhibition or publication of a form of expression issued pursuant to LSA-R.S. 13:4712 is defective and must be vacated.

[3] Gulf States attacks the rule nisi procedure under this statute. They claim that it shifts the burden of proof from the state to the party to be enjoined. We feel that the United States Supreme Court has approved the rule to show cause method of bringing the issue of obscenity to a hearing. Kingsley Books, Inc. v. Brown, supra. But the burden of proof must remain with the state to show obscenity. Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 738, 739, 13 L.Ed.2d 649 (1965). Therefore, we believe that the rule nisi or rule to show cause cannot be used to shift the burden of proof, but is an appropriate method of setting a hearing on the issue.

[4, 5] Gulf States argues that the statute does not provide a speedy trial, a guarantee of a prompt judicial decision, or an expedited appeal method, and therefore the statute is unconstitutional as applied to expression. We disagree that the statute does not pro-

vide a speedy hearing. The rule nisi is returnable in five days and we believe that this is a speedy hearing. We do think, however, that provision for a prompt judicial decision must be accorded to defendants who are to be enjoined from exhibiting a form of expression. As pointed out by the state in this case, the only guarantee of a judicial decision under LSA-R.S. 13:4711-13:4717 is found in LSA-R.S. 13:4207 which states that "[t]he district judges * * * shall render judgments in all cases taken under advisement by them, within thirty days from the time the cases are submitted for their decision." In the obscenity statute upheld in *Kingsley Books,* it is provided that "[t]he person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial." New York Code of Criminal Procedure § 22a(2), reprinted in Kingsley Books, Inc. v. Brown, supra. See also Freedman v. Maryland, 85 S.Ct. 734, 738, 739. Thus, in addition to the previous defect mentioned, we feel that LSA-R.S. 13:4712 is unconstitutional as applied to expression because it contains no guarantee of a prompt judicial decision.

[6] We are not convinced that an expedited appeal method is necessary for a constitutional statute. There appears to be no such method in the New York statute above, and we are not prepared to say that this is an absolute requirement.

In summary, the state may enjoin obscenity. However, the line between protected and unprotected ex-

pression is not a clear-cut one, and for this reason the state must surround its injunction procedures with certain safeguards. The first of these is the necessity for a member of the judiciary having discretion in whether or not a temporary restraining order is proper. Where hard-core pornography is suspected, the judge may feel the need for immediate action. Where the line is not clear, the judge may wish to withhold action until an adversary hearing is held. At any rate, discretion in the judge is necessary to guard expression which may be protected by the First Amendment. The second safeguard is a prompt adversary hearing with the state assuming the burden of proof on the issue of obscenity. The third safeguard is a prompt judicial decision. We might add that it would be well to include an expedited appeal method in connection with enjoining expression. As stated earlier, LSA-R.S. 13:4712 does not contain two of these safeguards. We hold that this deficiency renders the statute unconstitutional as applied to expression, and it can no longer form the basis for a temporary restraining order or permanent injunction against the exhibition or publication of suspected obscenity.

In view of our holding that the statute is unconstitutional there is no need to rule on the merits of the case.

Therefore, the judgment permanently enjoining Gulf States Theatres of Louisiana, Inc., Greater Broadmoor Theatres, Inc., Joe Gianforte and all of their agents, representatives, employees, assigns and all persons acting in concert with them from showing any version

of the motion picture entitled "The Stewardesses" at any and all locations within Caddo Parish, Louisiana, is reversed, the injunction is recalled and set aside, and plaintiffs' demands are rejected. Costs, such as are legally assessable against them, are taxed against appellees, the State of Louisiana and the Parish of Caddo.

APPENDIX D

STATE of Louisiana and The Parish of Caddo

versus

GULF STATES THEATRES OF LOUISIANA, INC., et al.

No. 52132

Supreme Court of Louisiana.
June 29, 1972.

Dissenting Opinion July 10, 1972.
On Rehearing Dec. 18, 1972.

SUMMERS, Justice.

Article 106 of the Criminal Code denounces as obscene the exhibition with intent to primarily appeal to the prurient interest of the average person of lewd, lascivious, filthy or sexually indecent motion picture film. Acting on this authority the district attorney of Caddo Parish, on behalf of the state and parish, brought this action against defendants, the owners and operators of the Broadmoor Theatre in Shreveport, to abate as a public nuisance the showing of the motion picture "The Stewardesses". The action was brought under the procedure prescribed by the Abatement of Nuisances Statute, Sections 4711-4717 of Title 13 of the Revised Statutes.

On this basis, and the sworn statement of facts contained in the petition filed by the district attorney, the trial judge issued an order restraining and enjoining

the exhibition of the motion picture. At the same time, as the statute prescribes, a rule to show cause within five days why a permanent injunction should not issue was served on defendants. Defendants filed motions to dismiss, exceptions of no cause and no right of action, a plea of unconstitutionality and motion for continuance. On the fifth day all motions and exceptions were overruled and the trial of the rule proceeded. A full hearing was had on the questions of the obscene nature of the film with the State assuming the burden of proof. At the conclusion of the evidence, the trial judge announced his reasons for judgment from the bench. He said:

> . . . the evidence as a whole shows that there was no plot or story to the movie and that it was merely scenes and acts in the context that made them lewd, lascivious, obscene and sexually indecent, and therefore in the opinion of this Court the dominant theme of this movie, "The Stewardesses" taken as a whole is designed to appeal to sexual prurient interest, and it is offensive and affronts contemporary standards relating to sexual matters and is without any redeeming social value. Its showing is therefore a nuisance and it is the judgment of this court that an injunction be granted . . .

A formal judgment was accordingly rendered and signed permanently enjoining defendants from showing any version of the motion picture within Caddo Parish.

On appeal to the Second Circuit, Section 4712 of Title 13 of the Revised Statutes was declared unconstitutional. Accordingly, the judgment of the trial court was reversed and the injunction recalled. 255 So.2d 857. An act of the legislature having been declared unconstitutional, we granted certiorari upon the plaintiff's application. 257 La. 154, 260 So.2d 698.

At the outset we hold that we agree with the trial judge and decide that "The Stewardesses" is obscene. The record amply supports the trial judge, and there is no manifest error in his findings. There was no plot or story. The movie consisted merely of a series of scenes or incidents portrayed in a context which made them lewd, lascivious, obscene and sexually indecent. The dominant theme is designed to appeal to prurient interest. The movie is offensive and affronts contemporary standards of the average person in the community, and it is without any redeeming social value. We note, also, that obscenity is not within the area of constitutionally protected free speech. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

Defendants' claim of unconstitutionality is that the Abatement of Public Nuisances Statute (La.R.S. 13:4711-4717) is a device to suppress without notice or hearing the right to exhibit this motion picture. As such, they say, the statute violates defendants' freedom of expression guaranteed by the First Amendment of the Federal Constitution and Article I, Section 2 of the Louisiana Constitution. Further, it is contended the statute is unconstitutional in that (1) its "rule nisi"

provisions casts the burden of proof on defendants; (2) there is no provision in the statute for a speedy trial court decision; (3) there is no speedy appellate procedure; (4) the mandatory penalties requiring that the building in which the nuisance exists be padlocked for one year violates the property owner's due process of law rights, and (5) the body of the act is broader than its title.

The part of the Abatement of Public Nuisances Act, Part A (La.R.S. 13:4711-4713) with which we are concerned, pertinently provides that an obscene motion picture, as defined by the criminal laws of this State, and the premises where it is displayed, are declared to be nuisances, and shall be enjoined. By the terms of Section 4712 of the Act, the district attorney, the sheriff or the parish governing authority, any corporation or association formed in this State for the suppression of vice, and any citizen of the parish may maintain an action to enjoin and abate such a nuisance. *"Upon the presentation of the petition for injunction alleging that the nuisance exists, verified by the affidavits of at least two persons, or verified by the affidavit of the district attorney or other parish official hereinabove designated on information and belief, the judge . . . shall grant a temporary injunction without bond."* A rule nisi must be issued, returnable in five days, and a hearing shall be had thereon. No such action may be brought by anyone other than the district attorney or other parish official hereinabove designated until the applicant obtains a certificate from the district judge that the applicant is acting in good faith and not for any improper purposes.

The injunction action may be dismissed upon contradictory motion. The motion to be accompanied by sworn statements of the mover and his attorney setting forth the reasons for dismissal.

I

The principal thrust of the attack upon the constitutionality of the act is aimed at the quoted provision declaring that "the judge . . . shall grant a temporary injunction." It is contended that there is no requirement that probable cause be shown through factual allegations in the affidavit accompanying the petition; that is, the mandate that the judge "shall" grant the temporary injunction deprives the judge of any discretion in the matter; the implication being that the judge must issue the temporary injunction whether the nuisance exists or not. For this reason, it is asserted, the First Amendment right of freedom of expression enjoyed by makers and exhibitors of motion pictures is restrained without reasonable cause.

This argument lacks merit. The statute requires that the petition allege the existence of a "nuisance" and that it be verified by the district attorney. This makes it necessary for the trial judge to determine, on the basis of the facts alleged, whether "obscenity", as defined by Article 106 of the Criminal Code, is "carried on" before he issued an injunction. If the allegations and the accompanying affidavit do not, in the judge's opinion, recite facts which warrant a conclusion that a "nuisance" is being "carried on" then the prerequisites to the issuance of the injunction have

not been satisfied and the judge must not sign the temporary injunction. On the other hand, if the allegations of the petition and the accompanying affidavit do set forth, in the judge's opinion, that a "nuisance" is being carried on, then, and in that event, he "shall" issue the temporary injunction.

Under this view a great deal of discretion is left to the trial judge for a judgment on his part must be made. He must ascertain from the petition and accompanying affidavit whether the facts set out fulfill those elements of the law which, taken together, constitute a nuisance. For instance, in this case, the petition must allege that the film must have been, and is being, exhibited with intent to primarily appeal to the prurient interest of the average person. And it must be lewd, lascivious, filthy or sexually indecent.

It is not mandatory that the judge sign every petition placed before him whether it is properly supported by the facts or not. We doubt that any trial judge so construes this statute. He "shall" sign only those injunctions which are supported by a sworn petition which alleges facts which constitute a nuisance. This is what occurred in this case. In the petition which he presented the district attorney alleged in detail the exhibition of the movie, the location of the theatre in close proximity to a public elementary school and a Baptist Church; that the movie was viewed by many people and that the movie was lewd, lascivious, obscene and sexually indecent and, as a whole, appealed only to prurient interests, and that it was without any redeeming social value whatever, particularly describ-

ing the details of the movie. In addition to the sworn statement of the district attorney, the assistant district attorney made oath to the verity of the allegations.

The word "shall" as used in this statute is nothing more than the mandate the law imposes upon the judge to issue an order, as in other cases, when the rights of the parties are supported by the law and properly alleged facts; e.g., "An injunction *shall* issue . . . ." La Code Civil P. art 3601); "A temporary restraining order *shall* be granted without notice when it clearly appears from specific facts shown by a verified petition by supporting affidavit . . . ."

Any restriction imposed in advance of a final judicial determination on the merits of obscenity must be limited by the shortest fixed period compatible with sound judicial resolution and the proceedings must be assured of a prompt final judicial decision. A period of fourteen days would not be too long within which to commence such proceedings. United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971).

Some prior restraint is necessary if the efforts of states to regulate obscenity are to be enforcible. Delta Book Distributors v. Cronvich, D.C., 304 F.Supp. 662 (1969).

Thus the procedure provided by the statute under review provides a reasonable basis for restraint. The judge is furnished with reliable information to satisfy himself of the factual basis for the issuance of the in-

junction. Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968). While the protection against prior restraint is an important right, it is not an absolute one. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957).

II

It is obvious that the Abatement of Nuisance Statute has given these defendants ample protection. The statute provides for the issuance of a temporary injunction to maintain the status quo if the judge is satisfied that a nuisance exists. He must set a date for an adversary hearing within five days thereafter. At that time a judicial determination of obscenity must be made. This was done in the case at bar. And the plaintiff here assumed the burden of proving obscenity as the law requires. Pearce v. Johnson, 213 So.2d 117 (La.App. 1968); Cloud v. Dyers, 172 So.2d 528 (La.App.1965). Thus, the statute was constitutionally applied in that the burden of proof was sustained by the plaintiff. And when a statute is constitutionally applied it must be upheld against a claim of constitutional infirmity on its face. ABC Books, Inc. v. Benson, 315 F.Supp. 695 (M.D.Tenn.1970); Gable v. Jenkins, 309 F.Supp. 998 (N.D.Ga.1969); Rage Books, Inc. v. Leary, 301 F.Supp. 546 (S.D.N.Y.1969).

Accordingly the claim that the "rule nisi" provisions casts the burden of proof on defendants is not well-founded.

III

There is ample provision in the statute for a speedy trial court decision. Five days after issuance of the temporary restraining order, the matter was heard and determined. This time interval meets the constitutional test set out by the United States Supreme Court in United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971), where a fourteen-day period was approved. The fact is that defendants found the time too short, or so they alleged, for they sought and were denied continuance or delays on several occasions. ABC Books, Inc. v. Benson, 315 F.Supp. 695 (M.D.Tenn.1970).

Procedural laws applying to injunctions generally are to be read into the contested act as supplementary thereto when they are not in conflict. In keeping with this obvious proposition, a reference to Article 3606 of the Code of Civil Procedure is relevant. It sets forth the time limitation for decision on a preliminary injunction:

> When a temporary restraining order is granted, the application for a preliminary injunction shall be assigned for hearing at the *earliest possible time* . . . . (Emphasis added.)

In our view the requirement that the hearing on the preliminary injunction be held at the "earliest possible time" carries with it the clear implication that the decision on the hearing also must be forthcoming at the "earliest possible time." Such a requirement is

the most stringent the law can impose, for surely the law cannot demand the impossible. That is what occurred in this case. The hearing was held and decided the same day — the "earliest possible time."

The argument is without merit that Section 4207 of Title 13 of the Revised Statutes, requiring that judges render judgments within thirty days after the case is submitted, permits an unreasonable delay. Although the section referred to does generally permit a thirty-day delay for rendition of judgments, this does not preclude the imposition of a shorter delay as in injunction cases. The applicable delay in the case at bar is that prescribed by Artile 3606 of the Code of Civil Procedure.

IV

The contention that there is no speedy appellate procedure prescribed in the statute is also untenable. The judicial determination of obscenity in the first instance is a speedy procedure as we have set forth in Part IV. The appeal procedure is as expeditious as the machinery of courts can reasonably be expected to function in such cases. La.Code Civil P. arts. 3601, 2081-2167. The matter was appealed to the Second Circuit and decided within five months. An application for rehearing was denied within fifty days. We granted writs in thirty-seven days. A motion for special assignment in this court was granted. In our view this was a reasonably prompt determination.

As Mr. Justice Harlan said in A Quantity of (Copies of) Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964):

> It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is of constant but rarely particularly topical interest.

Moreover, under a proper showing, the effect of the injunction may be suspended pending the appeal. La.Code of Civil P. art. 3612.

Defendants contend that the statute contains mandatory penalties requiring that the building in which the nuisance exists be padlocked for one year and this statutory requirement violates the property owner's due process of law rights. The statute does not make it mandatory that the building be padlocked for one year. It provides that the court shall direct the effectual closing of the building "for the period of one year, unless sooner released." La.R.S. 13:4714. The clause "unless sooner released" means that the closure may be for a lesser period than one year, six months, a week, a day, or for no time as in the instant case. The building has not been padlocked. Only the showing of the film in Caddo Parish was abated. Defendants have been in business operating the Broadmoor Theatre continually since the seizure of "The Stewardesses" film.

VI

It is asserted that the body of the act is broader than its title and for this reason the act violates the title-body clause of Article 3, Section 16 of the Louisiana Constitution: "Every statute enacted by the Legislature shall embrace but one object, and shall have a title indicative of its object."

The title of the 1970 amendment complained of sets forth:

> To amend and reenact Sections 4711 and 4715 of Title 13 ..., relative to the abatement of the public nuisances of assignation, prostitution or obscenity, to provide with respect to the enumeration of items declared to be nuisances in premises in which assignation, prostitution or obscenity is carried on, conducted, continued, permitted or exists; to provide with respect to the discontinuance of abatement proceedings upon the giving of bond by the owners of such premises by establishing an additional condition regarding obscenity; and to otherwise provide with respect thereto.

It should be noted that this title seeks only to amend two sections of the six-section act. Even a casual reading of the title and body of the act makes it readily apparent that the title is more than adequate to comply with the title-body clause of the Constitution.

The title of an act must be broadly construed with a view to effectuating, not frustrating, the legislative purpose. This is the sense in which this court has many times construed the title-body clause of the Constitution. Bethlehem Supply Company v. Pan-Southern Petroleum Corp., 207 La. 149, 20 So.2d 737 (1945). In resolving this issue, the presumption exists that the act is constitutional. State ex rel. Board of Com'rs., etc. v. Bergeron, 235 La. 879, 106 So.2d 295 (1958).

There is no violation of the title-body clause here.

For the reasons assigned the judgment of the Court of Appeal is reversed and set aside, and the judgment of the district court is reinstated and made the judgment of this court.

McCALEB, Chief Justice (concurring).

I agree with the majority holding that those portions of R.S. 13:4711-4717 which authorize the granting of a *permanent injunction* to abate a public nuisance as defined therein are not unconstitutional for any of the reasons urged by the defendants herein. I express no opinion, however, on that portion of the statute which provides for the granting of a *temporary injunction* when the petition for injunction is accompanied by affidavits of two other persons or the specified parish officials. It is my view that the question of whether the temporary injunction was properly issued in the instant matter passed out of the case and became moot when the judgment, ordering a permanent injunction, was rendered *after a full hearing*. For, assuming for

the sake of discussion that the provisions anent the issuance of a *temporary* injunction are of doubtful constitutionality, their invalidity would in no way affect the provisions authorizing the granting of the *permanent* injunction which are clearly severable from and not dependent on those which authorize the temporary injunction.[1]

It is therefore unnecessary that we determine, at this time, the validity of the provisions of the enactment which would require the issuance of a temporary injunction. Under these circumstances, this Court should not consider that part of the statute which deals with the procedure for obtaining a temporary injunction. Instead, it should adhere to our well-settled policy that the constitutionality of a statute will not be considered when it is not essential to a determination of the rights of the litigants in the case before it. Aucoin v. Dunn, 255 La. 823, 233 So.2d 530 (1970).

I respectfully concur.

TATE, Justice (dissenting).

I respectfully dissent. The issue in this case is not obscenity but censorship.

The judges of the Court of Appeal, Second Circuit, unanimously held that La.R.S. 13:4712 offended consti-

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[1]In fact, Section 4 of Act 362 of 1968, which amended and reenacted R.S. 13:4712 (the section which provides for the issuance of the temporary and permanent injunctions), specifically declares that its provisions are severable and that the invalidity of one portion shall not affect other provisions which can be given effect with the invalid provisions.

tutional protection of freedom of speech and communication insofar as it sought to be applied to padlocking premises for the showing of motion pictures. They so concluded (1) because it mandatorily requires an injunction closing a motion picture premises for a minimum of five days, on the ex parte affidavits of two persons or of a parish official alleging that the premises are a nuisance in which obscenity is carried on, and (2) because it does not provide for prompt judicial decision permitting, on successful review, the prompt re-opening of the enjoined movie. As our Second Circuit notes, the decisions of the United States Supreme Court requires this holding.

In the instant case, a small group of seven citizens from the same neighborhood, six of them belonging to the same church, felt that the movie appealed to the prurient interests of the average person and had no redeeming social features. They described certain scenes suggestive of sexual activity or misconduct. One of them complained that one of the actresses used bad language, namely "damn" and "bastard" (whether more than once he did not say).

These complainants, acting under the authority of the statute, complained to the district attorney and, through his filing this abatement suit, secured the closing of the show "The Stewardesses". These seven individuals' testimony alone is used as the basis for enjoining the showing of this film since June 25, 1971, first (June 25-30) on the ex parte affidavit of the assistant district attorney, then (June 30 to date), after the hearing, indefinitely without suspensive appeal.

From the record, neither the district attorney nor the trial judge ever saw the film. Relying upon the offended senses of these seven individuals, and their description of what they felt to be objectionable parts of the film, the film's showing was first enjoined, ex parte and without bond. Without viewing the film but accepting the testimony of these seven individuals at the hearing, the trial court then permanently enjoined the film's showing. No member of this court has ever viewed this film.

I should further note that the same statute authorizes the premises in which obscenity is carried on to be closed for a year. La.R.S. 13:4714. The plaintiffs in fact have prayed for this additional sanction. While the trial court refused this relief, in its ruling it specifically warned the defendants that, if another complaint came before it, the court would apply this harsh sanction. Tr. 279-280 (presumably, only after weighing the testimony of the complaining group of witnesses that the sexual scenes were offensive to them).[1]

In overlooking the serious constitutional defects in the statute, the majority suggests (1) although the statute states that, "Upon presentation" of the verified

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[1]Tr. 279-280: "THE COURT: * * * I am holding that the showing of this movie is in violation of the statute. Period. Now if they show another movie and you come back in, showing that, then I think that possibly we would be justified in going ahead and doing what you are asking to be done, closing the business for a year." In this connection, the court had earlier stated with regard to closing the premises for a year, Tr. 279: "Now, as I say to the District Attorney, if you have another one, come back, and then they know what to expect from the premises itself."

petition for injunction, the trial judge *"shall"* issue the injunction *"without bond"*, it really means that the trial judge "may" do so, (2) the circumstance that the statute does not require decision within a reasonable time, really means the decision should be made "within the earliest possible time" (divining this, because of a Code of Civil Procedure article to the effect that "a preliminary injunction shall be *assigned* for *hearing* at the earliest possible time", Article 3606), and (3) a speedy appellate procedure is available, since after all the closing of this show was decided by the intermediate court within five months (plus fifty days for the denial of rehearing), while this court (after writs were granted on February 11, thirty-seven days later, 260 La. 698, 257 So.2d 154), has only taken four and a half months to render its decision (and will take only an additional month to act on this rehearing).

If we assume to start with that the film is obscene, these delays may not seem inordinate. After all, the exhibitor was not entitled to show the movie at all, the saying goes.

Such an approach overlooks that, assuming a film is ultimately held unobjectionable and entitled to be protected against censorship by the Constitutions of the United States and of Louisiana, this same summary closing by an outraged few, not necessarily representative of informed opinion of the community, could not under our state procedures be annulled by appellate action for from five to ten months.

Special mention should be made of the five-day ex parte closing of *motion pictures* by the procedure involved. The normal showing of a film is for a week or less. The exhibitor normally has to pay minimum rentals for the use of the film, whether or not any audience sees it. The mere threat of a small group to secure this ex parte closing, even for only five days, would deter an exhibitor from even attempting to show a film, no matter how groundless the objections of the few are. I might also add that, as this present proceeding illustrates (see text at Footnote 1), the potential sanction of padlocking the premises for a year results de facto in censorship power being given to private individuals, who by the mere threat of seeking to obtain it may deter future showings of other films to which such a small private group may also object.

Incidentally, nowhere has it been proved that the showing of this movie violates any of the criminal laws of this state relating to obscenity or pornography. No criminal prosecution has ever been attempted. What we have before us is the distaste for this film of seven private individuals (an extremely decent group, with *very* high morals, it is true), who upon receiving word from a neighbor who had seen the movie in Colorado that it was objectionable, went to see it with the purpose of filing a complaint and closing the show.

Even these individuals admit that the film in question, "The Stewardessess", is not hard core pornography. Nudity and sexual activity, according to their testimony, is suggested rather than actually depicted. Profanity or the so-called four-letter words are not util-

ized, the speech objected to by the witnesses being mostly double entendre.

The evidence shows that, before its closing by ex parte injunction on June 25, some 12,000 people of Shreveport had seen "The Stewardesses" after it opened on June 11, with 95% of the comments about it favorable. During the summer of 1971 it was nationally rated as one of the ten most popular pictures exhibited in the United States. It has been exhibited in some 180 American cities, including New Orleans, Houston, Dallas, and Beaumont, and has been seen by over 3,000,000 persons.

The defense witnesses who saw the film described it as a spoof or satire on the alleged sex life of airline stewardesses. They regarded it as entertainment appealing to humor rather than to prurient sexual instincts.

Fundamentally, when obviously in the local community and in this State and in this nation a great many would not find this film objectionable, its closing (or the closing of any film) upon the objections of only a few private individuals should not be sanctioned, in the absence of procedural safeguards providing for *judicial* determination that the showing of the film violates our criminal law and in the absence of procedural safeguards providing for *prompt* appellate relief from holdings which may unconstitutionally censor the showing of such films.

The Louisiana Court of Appeal, Second Circuit, properly found that the statute, under which the showing of this film is enjoined, does not provide such procedural safeguards and that therefore its application here violates constitutionally-protected freedom of speech and communication. I think that court's unanimous opinion dissolving the injunction should be affirmed, and I respectfully dissent from our majority opinion reversing it.

DIXON, Justice (dissenting).

I dissent.

I agree fully with the dissent of Justice Tate. The statute, R.S. 13:4711 et seq. is unconstitutional on its face as it applies to restricting an individual's First Amendment freedoms. I would affirm the judgment of the Court of Appeal.

This court has *never* viewed the film, yet we find the film obscene, without a plot or story line, lewd, lascivious, sexually indecent, appeals only to prurient interest, affronts and offends contemporary community standards of decency, and is without any redeeming social value. It should be incredible that the majority of the court could make this holding without viewing the film. Not even the trial court judge or the district attorney who brought the prosecution viewed the film. In fact, there is no evidence that *any* judge who has participated in this case has viewed the film.[1]

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[1]The film was not in the record sent to this court.

The basic test for obscenity was laid down in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. It is: "to the average person, applying contemporary community standards, the dominant theme of the material as a whole appeals to the prurient interest." The community standard referred to is a *national* community standard. Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 795. That this film has been shown in at least one hundred eighty cities in the United States without ever having been censored, save in Shreveport, Louisiana, is substantial evidence that it does not offend national standards. See A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts, 383, U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1.

In Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649, the procedure for review of allegedly obscene material was laid down: (1) the state must bear the burden of proving the film's obscenity, (2) action by the censor must be subject to immediate court review, and (3) the final court decision must be available within a very short time. The procedure laid down by R.S. 13:4711 et seq. does not meet the first and third tests. A prompt final judicial determination has been suggested to mean sixty days. Teitel Film Corporation v. Cusack, 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966. This would mean that this court would have to render its final decision within sixty days after the institution of the procedure to censor the film.

One of the most repugnant features of R.S. 13:4711 et seq. is that it does not give the trial judge discretion. The statute provides that the trial judge "shall" issue the injunction when a petition and certain affidavits are filed. The statute has no requirement that the injunction issue upon a showing of probable cause.[2] Another repugnant feature of the statute is that it does not have any requirement that the judge view the film.

The Bill of Rights of the Louisiana and United States Constitutions are once again subordinated to statutory material that, on its face, is unconstitutional.

BARHAM, Justice (dissenting).

I concur in the dissenting opinions of Mr. Justice Tate and Mr. Justice Dixon, but I feel I must very pointedly call attention to the fact that for over a year the exhibiting of the motion picture "The Stewardesses" has been suppressed in Caddo Parish as obscene, and to this date no judge, no judicial tribunal, has yet viewed that film to determine whether its expression is protected by the First Amendment or whether it is obscene and therefore outside the ambit of that protection. It is imcomprehensible to me that without even viewing the material alleged to be obscene in order to make an objective finding, the majority has concluded that "The Stewardesses" is obscene.

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[2]The statute is so broad that, on presentation of a petition with affidavits by two persons that "Snow White and the Seven Dwarfs" is a "nuisance," because seven lecherous creatures take into their home an innocent young girl, the judge is *required* to grant an injunction.

In State v. Eros Cinema, Inc., 259 So.2d 912 on our docket, handed down on the same day as this opinion, we took note of the question posed by the United States Supreme Court as to whether a magistrate issuing a warrant for seizure of a motion picture might be required to view it before seizure. See Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313. There can be no doubt that a judicial determination which would finally suppress any expression as being obscene requires personal observation and review of that obscene material unless through no fault of the State it has been destroyed or is otherwise unavailable. I make this point at the beginning of this dissent in order to quickly indicate how unreasonable, how judicially unsound, is the majority opinion here in its totality.

But the issue before us, as I see it, is whether the relevant law, R.S. 13:4711-17, is constitutional insofar as it attempts to enjoin and suppress obscenity. These statutes permit the total ex parte suppression of any expression thought by two citizens to be obscene. They provide for an automatic and ex parte five-day injunction and negate any judicial discretion in this regard. Release of the allegedly obscene material may be had only upon response to a rule nisi (a rule to show cause why the material should not be permanently enjoined) or a motion to dismiss stating cause. Thus the defendant is required to carry the burden of establishing that his expression is protected by the First Amendment. The five-day mandatory injunction, which may be had without any hearing during that time, appears to conflict with our own requirement for speedy judicial

hearing expressed in State v. Eros Cinema, supra. The present proceedings, being civil in nature, fall within the general law for civil appellate review, and that procedure is inadequate according to our expression on speedy appellate review in Eros Cinema, this day decided.

The Second Circuit Court of Appeal properly found that the statutes as applied to obscenity lacked the necessary safeguards constitutionally required for the protection of freedom of expression. See Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460; Kingsley Corp. v. Regents of U. of N.Y., 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512; Marcus v. Property Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127; Manual Enterprises v. Day, 370 U.S. 478, 83 S.Ct. 1432, 8 L.Ed.2d 639; Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584; Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793; A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809; Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649; Teitel Film Corp. v. Cusack, 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966; Interstate Circuit v. Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 255; Lee Art Theatre v. Virginia, supra; Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1. Cf. Kingsley Books v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469; Times Film Corporation v. Chicago, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403; Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498; United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822.

On June 26, 1972, the United States Supreme Court granted certiorari in three cases concerning the First Amendment privilege and obscenity. In Paris Theaters v. Slaton, on the docket of that court, 408 U.S. 921, 92 S.Ct. 2487, 33 L.Ed.2d 331, the questions presented by the petition for review were whether a temporary restraining order against exhibiting allegedly obscene film is precluded by absence of statutory procedural safeguards, and whether such may issue before an affirmative showing that the pictures offend customary standards of decency. The Georgia Supreme Court had ruled in that case very much as the majority has here. Slaton v. Paris Adult Theatre I, 228 Ga. 343, 185 S.E.2d 768. In addition to a review of the Georgia Supreme Court's holding and the questions set forth, the United States Supreme Court asked for special briefing and argument on the question: "Whether the display of any sexually oriented films in a commercial theatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the films to juveniles, is constitutionally permissible?"

The questions presented for review when the court granted certiorari in Alexander v. Virginia, on its docket, 408 U.S. 921, 92 S.Ct. 2490, 33 L.Ed.2d 332, to review a decision of the Virginia Supreme Court, Alexander v. Commonwealth, 212 Va. 554, 186 C.E.2d 43, were whether prohibition of jury trial to determine obscenity prior to restraint on literary materials and application of the citywide community standards of judging obscenity rather than the national standard violated the Constitution. The court asked for special brief and argument, as in Paris Theaters, on whether regulated

sale of sexually oriented magazines to adults is constitutionally permissible.

In Kaplan v. California, 408 U.S. 921, 92 S.Ct. 2493, 33 L.Ed.2d 331 on the United States Supreme Court docket, certiorari was granted to review an appellate court decision, People v. Kaplan, 23 Cal.App.3d Supp. 9, 100 Cal.Rptr. 372. Among the many questions presented concerning the sale of an allegedly obscene book was whether the adoption of state community standards as opposed to national standards violates First Amendment guarantees.

While the exact legal guidelines for determining whether, when, and how obscene expressions are protected by the First Amendment are in a state of flux, it is certain that our statute does not meet the minimum standards now required by the United States Supreme Court.

For the reasons assigned by the Court of Appeal, Second Circuit, those assigned by the other dissenting justices, and those I have stated and the authorities cited, I respectfully dissent.

ON REHEARING

McCALEB, Chief Justice.

This rehearing was granted principally for reconsideration of two contentions: First, whether the fact that no member of this Court, nor the judge of the district court hearing the case, had seen the motion

picture precluded the Court from properly appraising defendant's constitutional privilege of free speech under a civil charge of obscenity;[1] and, second, because the point was stressed again that we were wrong in applying a contemporary community standard instead of the national standard in determining that the picture was obscene and, hence, not entitled constitutionally to the protection of the First Amendment.

While the case was pending on reheraing, the Court viewed the picture, which has served only to confirm our original conclusion, based on the statements of the witnesses who testified for the state, that the film portrays solely hard-core pornography in all respects. It has no plot or any other feature, in our estimation, which takes it out of that category,[2] despite the protestations of defense counsel to the contrary anent its popularity and box-office appeal. The latter argument exhibits, perhaps, public curiosity, but it does not rescue the lurid content of the film from the gutter.

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[1]This complaint was vigorously registered by the three dissenting justices and voiced also by counsel for defendants during oral argument on rehearing as well as in their application for a rehearing and briefs on rehearing. Barham, J., dissents with written reasons. Dixon, J., dissents. The court of appeal was eminently correct. It is regrettable that this court approve, even for a short time, a censorship statute, especially while other adequate constitutional means of controlling obscenity are available to law enforcement officials. Tate, J., concurs in Barham, J.'s, primary dissent and in Dixon, J.'s, dissent and assigns additional written reasons.

[2]The picture deals in disconnected sequences with the off-duty lives of airline stewardesses, (presumably) during stopover travel. The pursuits of these young women refer exclusively to their sexual encounters, showing them engaged in acts of fornication, lesbianism, masturbation and even, in one sequence, as the partner in an act of sadism.

If ever a motion picture fit exactly into the definition of obscenity as set out in Section 251.4(1) of the American Law Institute's Proposed Model Penal Code, cited by the United States Supreme Court with approval in Jacobellis v. Ohio, 378 U.S 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964), this one does. The pertinent portion of that definition is to the effect that "Material is obscene, if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. * * *" Under that definition, this picture is not only hard-core pornography, but is obscene to an extreme degree.

As to the second contention, i. e., that the state did not prove the national standard to be applied for determining whether the picture is obscene, we are convinced there is no way of proving a national standard in these cases. It seems to us, unless it is shown by affirmative evidence on the part of the defendant that the contemporary community standard is not in accord with the national standard, the contemporary community standard must be presumed to be the national standard. Who, in any case, is qualified to expound reliable expert evidence as to the national standards of obscenity? Is it Variety Magazine, espoused by defendant? We think not.

Until, therefore, such affirmative evidence as to a national standard is offered by the defendant, we hold to the test laid down in Roth v. United States, 354 U.S.

476, 77 S.Ct. 1304, 1 L.Ed.2d 1498,[3] i. e., "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

This test was reaffirmed in Jacobellis v. Ohio, supra, the court adding, however, it must be determined in the first instance that the material "goes substantially beyond customary limits of candor in description or representation of such matters," which verbiage is quoted from the definition of obscenity as given in the Proposed Model Penal Code, above quoted.

In that case the Court also explained that by "contemporary community standard" in the Roth-Alberts test, it meant the "national standard;" consequently, that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. However, the court laid down no guidelines as to how such a "national standard" may be established or proved. Instead, in a footnote the court refers, apparently with approval, to the Model Penal Code, a New Jersey decision, and a treatise entitled "Censorship of Obscenity: The Developing Constitutional Standards." 45 Minn. L.Rev. 5, by Lockhart and McClure.

But these authorities offer no aid in determining the manner in which a "national standard" as to obscenity may be arrived at or proved. The code merely pro-

[3]This is also the citation of Alberts v. State of California, decided the same day, the landmark decision on obscenity being referred to generally as the Roth-Alberts test.

vides evidence is admissible to show "the degree of public acceptance of the material in the United States." Article 251.4(4) (d). The New Jersey case[4] does no more than discuss the Roth-Alberts test and the subsequent decision in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639, in which the court held obscenity is a two-fold concept, requiring proof of (1) patent offensiveness, and (2) "prurient interest" appeal.

The law review article points out the weakness inherent in such an approach thusly: "But if the contemporary standards of particular state and local communities are not constitutionally applicable, whose standards are? If we turn to the national community — the American public in general — we find this standard illusory. * * *

"Beyond hard-core pornography we find ourselves without a reliable guide when we look to 'community standards.' For as Judge Jerome Frank pointed out more than ten years ago, 'we do not know, with anything that approximates reliability, the "average" American public opinion on the subject of obscenity.' "[5]

Significantly, after detailed study of obscenity cases, the authors of the Minnesota Law Review articles conclude that "Of the national community's contemporary standards, we know only that contemporary

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[4]State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963).

[5]See Roth v. Goldman, 172 F.2d 788.

American society rejects and will not tolerate the dissemination of hard-core pornography."

As we read the decision, the Jacobellis case is authority for the proposition that only the United States Supreme Court is qualified to apply constitutional standards and criteria for an ultimate determination on appellate review, on a case to case basis, whether the dominant theme of the reprobated material, "taken as a whole appeals to prurient interest," and, thus, is or is not protected by the First Amendment.[6]

In the instant case, we conclude that the motion picture is obscene and, therefore, not insulated from state restraints as a nuisance under authority of R.S. 13:4711-4717.

Counsel for defendants have reurged their contention that R.S. 13:4712 is unconstitutional, being violative of the due process clause of the Fourteenth Amendment in that the statute fails to provide adequate procedural safeguards for a hearing in protection of de-

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[6]In determining the film in the Jacobellis case was not pornographic, and, therefore, protected by the First Amendment, the court seemed to be impressed by the fact that the film had a plot. It stated the picture had been shown, in approximately 100 large cities of the country, but admitted that while it was favorably reviewed in a number of national publications, it was disparaged in others. It also seemed impressed by the fact that it was rated by at least two critics of national stature among the best films of the year in which it was produced; but it makes no mention of the opinion voiced by the numerous other critics of national stature. The court's conclusion, after viewing the film, was that it "was not obscene within the standards enunciated in Roth v. United States and Alberts v. California," which standards it reaffirmed.

fendant's right of free speech under the First Amendment.

Further, counsel citing the cases of Marcus v. Property Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), and A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964), proclaim that the author of the concurring opinion on first hearing (the author of the present majority opinion) erred in failing to consider the validity of that part of R.S. 13:4712 which provides the procedure for the issuance of a temporary injunction. In reasserting their plea of unconstitutionality to that part of the statute, they claim that its invalidity infects the remaining portions thereof, resulting in the unconstitutionality of the entire enactment.

A study of the cited cases reveals that counsel are correct in their contention that, in cases such as this (involving the First Amendment privilege), the validity of the entire statute is always to be considered. Hence, the author of the concurring opinion erred in applying the general rule relative to temporary restraining orders and injunctions to this case which deals with the constitutional right of defendant to show the film in question.

A consideration of that issue, however, does not affect the result reached on our first hearing, for the reason that the concurring justice (the author of the instant majority opinion), after a study of that part of the statute providing for the issuance of a temporary injunction, has concluded that, for the reasons set forth

in the first majority opinion, the statute is valid in that respect. It would serve no useful purpose to reiterate those views herein.

Finally, defendants have urged again their contention that R.S. 13:4711-4717 is unconstitutional in that it is violative of Section 16 of Article III, of the Louisiana Constitution, providing that every act shall have but one object and that object shall be indicated without merit. We adhere to that conclusion, believing that further elucidation here would be superfluous.

For the reasons assigned, our original opinion is reinstated and made the final judgment of this Court.

ON REHEARING

BARHAM, Justice (dissenting)

On June 25, 1971, the district attorney for Caddo Parish filed a petition for a temporary restraining order as well as for a permanent injunction against Gulf States Theatres of Louisiana, Inc., Greater Broadmoor Theatres, Inc., Joe Gianforte, and their agents and employees, alleging *"upon information and belief"* that these parties were showing a motion picture believed to be obscene. The restraining order, a permanent injunction, and abatement of the film and the theatre as a nuisance were sought under authority of R.S. 13:4711-4717. Upon presentation of the petition for injunction, accompanied by the verification affidavit of the district attorney and his assistant, the court temporarily enjoined the defendants from removing

any personal or other movable property from Broadmoor Theatre, from opening the theatre, and from exhibiting the motion pciture "The Stewardesses". The defendants were directed to show cause five days thereafter why a final injunction should not issue closing the Broadmoor Theatre for a period of one year. On the return date of the rule for a permanent injunction evidence was taken, and oral reasons for judgment were given in open court. Two days later a judgment was signed permanently enjoining all of the defendants from exhibiting the motion picture "The Stewardesses" within Caddo Parish, Louisiana.

On appeal the Second Circuit Court of Appeal declared R.S. 13:4712 unconstitutional as applied to expression, and held that it could therefore not serve as a basis for a temporary restraining order or a permanent injunction against the exhibition or publication of suspected obscenity. 255 So.2d 857. We granted writs as a matter of right because an act of the Legislature had been declared unconstitutional. Bradford v. Department of Hospitals, 255 La. 888, 233 So.2d 553 (1970).

The defendants' position is that after a financially successful two-week showing of the motion picture "The Stewardesses", they were, and they remain, permanently enjoined from showing any version of that motion picture. That picture has been exhibited in more than 180 cities throughout the nation and been viewed by more than 3,000,000 people. Defendants allege they are permanently deprived of revenue of approximately $10,000.00 per week since they can-

not show this picture, which is what is usually termed a "box-office success". At any time during the year and a half from the initial suppression to date the defendants could very profitably have exhibited this film for several weeks. It is apparent, then, from this viewpoint alone that no issue raised by the defendants is moot. They suffered immediate palpable injury which continues in perpetuity under the permanent injunction.

Moreover, certain features in the statutes under which this action was brought make any adjudication in the present case perpetually effective against these defendants' right of expression.[1] Under authority of one of those provisions the trial court has stated that if there is any showing of a similar film, the Broadmoor Theatre will be closed for all purposes for one year.

Also within validity is any argument that the attack upon the initial ex parte temporary restraining order has become moot since a permanent injunction has issued in this case after adversary hearing. The subsequent hearing, even if full and adequate basis for the permanent injunction, does not make moot the attack upon the constitutionality of the statutory provisions for the original ex parte suppression. When any judgment is obtained in proceedings where the Fourteenth Amendment right of due process is denied, the need to vindicate the aggrieved party's constitutional rights requires a reversal.

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[1]See R.S. 13:4713, 4714, 4717.

A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct 1723, 12 L.Ed.2d 809 (1964), and Marcus v. Property Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1966), were each postured very similarly when reviewed by the United States Supreme Court. In each an initial seizure of obscene publications was made under procedures lacking the safeguards required for due process so as to assure non-obscene material the constitutional protection to which it is entitled. After a full adversary hearing in each case upon notice and with other due process procedures, the seized materials were declared obscene and held for destruction. In each case the court pretermitted any question of obscenity in fact or of the validity of the judgment after hearing, considering only that the procedure leading to the original ex parte seizure was constitutionally deficient. Judgment in each case was reversed for that reason alone.

In Marcus the court stated: "* * * We have no occasion to reach the question of the correctness of the finding that the publications are obscene. Nor is it necessary for us to decide in this case whether Missouri lacks all power under its statutory scheme to seize and condemn obscene material. Since a violation of the Fourteenth Amendment infected the proceedings, *in order to vindicate appellants' constitutional rights, the judgment is reversed,* and the cause is remanded for further proceedings not inconsistent with this opinion." (Emphasis here and elsewhere has been supplied.)

In A Quantity of Books v. Kansas, supra, the court said: *"Nor is the order under review* [condemning the material to destruction as obscenity] *saved because, after all 1,715 copies were seized and removed from circulation, P-K News Service was afforded a full hearing on the question of the obscenity of the novels.* For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of nonobscene books. * * * Here, as in Marcus, '[s]ince a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights' * * * *the judgment resting on a finding of obscenity must be reversed,*" See also Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

The defendants, having alleged that the statutes under which this action is maintained were unconstitutional under the Fourteenth and First Amendments, having established palpable injury from the moment of the original ex parte suppression to date and even in the future, and having alleged a chilling — more, a freezing — effect upon their constitutional right of free expression in the future, having standing in this court to test the validity of the statutes under their several attacks of unconstitutionality. Therefore, we initially dispense with the question that any portion of the defendants' attack upon the constitutionality of the several provisions is now moot.

The attacks upon the constitutionality of the statute are so numerous that it is difficult to enumerate them

and even more difficult to find an adequate form for a judicial expression upon the various issues.[2] We are here concerned with the State's right to regulate obscene expression. Every exercise of the State's right to control obscenity "* * * implicates questions whether th procedures * * * were adequate to avoid suppression of constitutionally protected publications. "* * * [t]he line between expression unconditionally guaran-

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[2]Among the attacks are: (1) The statutes under First Amendment to the United States Constitution and Article I, Section 2, of the Louisiana Constitution are unconstitutional on their face and cannot be used as an ad hoc censorship device to suppress without notice or hearing these rights relating to freedom of expression, press, motion picture, radio and the like — all of which are constitutionally protected. (2) The statutes are unconstitutional in that the trial court is required to issue an ex parte temporary injunction to immediately restrain or suppress an alleged obscenity upon presentation of petition and affidavits "on information and belief" with no requirement that "probable cause" be shown but with only a requirement that in some cases the trial court must determine the application to be "in good faith and not for any improper purpose". (3) The "rule nisi" provision unconstitutionally casts the burden of proof upon the defendants. (4) The statutes are violative of constitutional rights in their control of expression because they provide for prior restraint without an adversary judicial determination. (5) The statutes are unconstitutional in failing to provide for a speedy adversary hearing and decision, for speedy appellate review, and for speedy final judgment. (6) The statutes are unconstitutional in providing that the premises where any obscenity is found to exist shall be closed for all purposes for a year. (7) The statutes are unconstitutional in providing that defendants may be cast in judgment upon the basis of the general reputation of the premises or the persons frequenting them or of the defendants themselves. (8) The statutes are unconstitutional in that they provide for the destruction of property without due process. (9) The statutes are unconstitutional in that the body of each amendatory act is broader than its title, in that none of the amendatory acts gives any indication that it intends to regulate basic rights of free speech and expression through definition and control of obscenity.

teed and speech which may legitimately be regulated, suppressed, or punished is finely drawn * * *. The separation of legitimate from illegitimate speech calls for * * * sensitive tools * * *'. Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460, 1472. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech". Marcus v. Property Search Warrant, supra.

Keeping constantly in mind, then, that under consideration here is the delicate line of demarcation between unconditionally guaranteed freedom of speech and one of the very limited exceptions under which speech and expression may be legitimately regulated or suppressed. I examine the attacks upon the constitutionality of Louisiana Revised Statutes 13:4711-4717.

A history of the development of the statutes casts light upon the consideration of the constitutional attacks. The statutes originated with Act 47 of 1918, which was an act to declare houses of prostitution and their contents nuisances and to provide means to enjoin and abate them. All seven provisions, R.S. 13:4711-4717, remained unchanged for over 40 years. In 1960 the Legislature attempted by Act 201 to amend Section 4711 to include *obscenity* with *prostitution* in the definition of a nuisance.

Chapter 32 of Title 13 of the Revised Statutes of 1950 is titled "Particular Classes of Actions and Cases". Part I is titled "Abatement of Public Nuisances". Subpart A, titled "Houses of Prostitution", contains these statutes which remained as originally enacted when the Revised Statutes of 1950 were adopted. They provide, as the title indicates, only a civil action for the abatement of the *nuisances of houses of prostitution*. Subpart B of Chapter 32, Part I, is a group of statutes designed to control and to abate the public *nuisance of gambling houses*. The control of prostitution, as indicated, originated in 1918. Two years later the control of gambling through abatement as a public nuisance was legislated. Disorderly houses (when properly defined), houses of prostitution, and gambling houses have always been subject to control, regulation, and suppression under the police power of the state. Moreover, the control of nuisances in general is usually governed in some part by *police regulations*. Analogous to the common law nuisance is our Civil Code Article 669, which states insufferable inconveniences are regulated and governed by the custom of the place and the *"rules of the police"*. At common law, nuisances per se include those activities which are forbidden by criminal law and sanctions.

Through development of a special civil action for the abatement of the nuisance of *prostitution*, our Legislature provided that houses of prostitution could be abated upon the petition of the district attorney or upon the petition and proper affidavit of interested parties. But the control of the act of prostitution is in no wise analogous to the control of obscenity. Although it may

be possible to incorporate in some manner under the title "Abatement of Public Nuisances" the control of places where obscene expression is exhibited, published, or otherwise communicated, there is no corollary between control of the nuisance of prostitution and control of expressions which are subject to regulation only when they cross over that fine line into obscenity. A reading of R.S. 13:4711-4717 in light of their development and in light of their original purpose of controlling only the nuisance of prostitution makes apparent the reasons for the numerous attacks upon these statutes when they are used to control *obscenity*. The provisions must then be examined with careful consideration of the guarantees of freedom of expression afforded by the United States Constitution, Fourteenth and First Amendments, and Louisiana Constitution Article I, Section 3.

R.S. 13:4711 declares any place a nuisance where there exists prostitution or obscenity as defined by the criminal laws of the state. R.S. 13:4712 provides the procedure for an ex parte temporary injunction and for permanent injunction after hearing on a rule nisi to abate the nuisance perpetually. R.S. 13:4713 provides for contempt penalties for violation of any of these provisions relating to the injunction and for lien upon and seizure and sale of the property where the nuisance was conducted for the fines imposed upon a finding of contempt. R.S. 13:4714 closes the place where the nuisance existed so that it cannot be used for any purpose for a period of up to one year. R.S. 13:4715 and 4716 provide for bond for release of property and disposition of fines and collection of fees. R.S.

13:4717 provides that *judgment* as to what constitutes a nuisance *"may be based on the general reputation so proven"*.

The statutes are attacked as being unconstitutional on their face for several reasons. Attack is made upon the language of R.S. 13:4712 which mandates that a temporary injunction "shall" be granted by the judge upon the simple allegation by the district attorney *upon information and belief* of the existence of obscenity without any requirement of a showing upon probable cause that obscenity is being published in some manner. When the district attorney presents the petition and his verified affidavit, the judge is required without the exercise of discretion to issue a temporary injunction. If one other than the district attorney or other parish official named in the statute brings the action, it is required only that a certificate be obtained from the judge that the applicant is acting in good faith and not for improper purposes. In either instance no adjudicative function at all is required. The statute calls only for a simple ministerial act by the judge. "Shall" is a command leaving no room for discretion. Naquin v. Iberia Parish School Board, 157 So.2d 287 (3rd Cir. 1963). As the appellate court succinctly stated "* * * Rather than a judicial mind passing on the relative merits of the petition, the judicial hand is forced by the Legislature to sign a temporary restraining order."

However, even if the literal wording of the statute — the word "shall" — were construed as not requiring a simple ministerial act by the judge, this Court is

still forced to find that there are no standards prescribing the *consideration for a judicial determination* of whether to issue or to refuse to issue the temporary restraining order. Is judicial determination for issuing the ex parte order made "from specific facts shown by verified petition or by supporting affidavit that immediate and irreparable injury, loss, or damages will result to the applicant before notice can be served and a hearing had"? C.C.P. Art. 3603. This is the ordinary basis for the issuance of a temporary restraining order. Certainly these Code of Civil Procedure requirements are not sufficient to satisfy the First Amendment requirements. If the court were considering whether a Fourth Amendment warrant for search and seizure was properly issued, it would examine the affidavit for facts to establish probable cause to review the basis for that judicial determination. However, there is no method whereby a requirement of probable cause for a criminal search warrant can be read into a civil statute for abatement of nuisance. So, if it is assumed arguendo that the judge is not mandated to act but can make a judicial determination to issue or not to issue the ex parte injunction, the statute is nevertheless unconstitutional because no standards are set which govern the judicial determination for the issuance of the ex parte injunction.

Although the State may regulate the dissemination of obscene expression since obscenity is an exception to the constitutionally protected right of free speech, the State is required to observe stringent safeguards in the exercise of this right to prohibit. The very minimum constitutional standard required before there can

be a suppression of an expression alleged to be obscene is an independent judicial finding of probable cause that the expression is obscene and therefore not constitutionally protected speech. Marcus v. Property Search Warrant, supra; A Quantity of Books v. Kansas, supra; Bantam Books v. Sullivan, supra.

In State v. Eros Cinema, Inc., 262 La. 706, 264 So.2d 615 (1972), we specifically and unanimously determined that there could be no seizure of an allegedly obscene expression without a prior judicial determination of an adequate factual basis for a probability that the expression constitutes obscenity. In that case, as in a number of cases decided by the United States Supreme Court which are cited there, we are considering a seizure under a search warrant for the purpose of criminal prosecution.

In Marcus v. Property Search Warrant, supra, the court, pretermitting the question of lack of hearing before seizure, held the seizure under the warrant unconstitutional for the warrant gave total discretion to the executing officers to make an on-the-scene determination of what constituted obscene publications. In Marcus the court also condemned the issuing of warrants and the seizure of the allegedly obscene materials "* * * on the strength of the conclusory assertion of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene". That court concluded: "Mass seizure in the fashion of this case was thus without any safeguards to protect legitimate expression."

The case at hand can be compared with Marcus. Here the simple verified affidavit of the district attorney on information and belief sustains an immediate order of suppression by injunction of alleged obscenity. This suppression is equally as effective as, and perhaps more onerous than, a seizure under search warrant. Moreover, the order for temporary injunction in the instant case is a mass suppression such as was condemned in Marcus, for it contains the following proviso: "And further *from conducting the said nuisance known as the Broadmoor Theatre* and especially exhibiting the motion picture, "The Stewardesses'." The order does not suppress only one film; it suppresses all films. The statute on its face permits this suppression without any prior judicial determination, even ex parte, that the material to be suppressed is probably in fact obscene. The lack of standards for a judicial determination of probable cause is contrary to the numerous United States Supreme Court pronouncements that this is a minimal requirement for constitutionality of statutes providing for suppression of alleged obscenity before an adversary hearing. There is no provision in our statute requiring an independent judicial determination of the probability of obscenity before an ex parte order of suppression issues.

The plaintiffs argue that there was actually a judicial determination of probable cause here. Even if such were the case (and I find to the contrary),[3] it avails

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[3]The temporary restraining order was in fact issued in violation of constitutional due process required in the regulation of expression generally protected under the First Amendment. No facts at all were given to support a finding of probable

plaintiffs naught. The fact that in a particular case a judge does make a probable cause determination of obscenity before signing the temporary restraining order cannot rehabilitate a statute constitutionally defective because it fails to adopt such a standard. While a statute not unconstitutional on its face may be unconstitutionally enforced, *a statute which is unconstitutional on its face cannot be constitutionally enforced.*

I am constrained to find that R.S. 13:4712 is unconstitutional on its face because it authorizes the total ex parte suppression of alleged obscenity without any independent judicial determination on facts that the expression is probably obscene.

Defendants further attack the constitutionality of R.S. 13:4711-4717 on the basis that they provide for prior restraint without notice or trial. Alternatively, defendants argue that if prior restraint can be had ex parte, adequate safeguards for speedy judicial adversary hearing are not provided.

I first address myself to a consideration of prior restraint in the context in which it is used in much of the current jurisprudence. The question then is bifur-

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cause. The district attorney on information and belief, without divulging the source of his information or asserting the credibility of the informant, recited hearsay for the purpose of alleging that the motion picture was obscene. This is even less than the content in the affidavits which were condemned in Marcus v. Property Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); and Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968). There was in fact no finding of probable cause.

cated: (1) Can there be prior restraint of future publication, circulation, or exhibition of an obscene expression in a *civil* proceeding without notice and hearing after the initial publication of that expression? (2) If so, what are the limitations and safeguards required for constitutionality of such restraint?

I shall begin the search for these answers with an examination of United States Supreme Court decisions which are concerned with state regulation of obscenity. Times Film Corporation v. Chicago, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961), is often cited for the broad principle that prior restraint without notice and hearing may be had. The limited holding of Times Film Corporation is: "Petitioner's narrow attack upon the ordinance does not require that any consideration be given to the validity of the standards set out herein. They are not challenged and are not before us." The court posed the one question it answered: "* * * whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide." The court, with four justices dissenting, held the ordinance not void on its face under such an attack.

In Bantam Books v. Sullivan, supra, the court said: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. * * * We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint. * * *"

(Citing Kingsley Books v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957).

Then in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the limited holding of Times Film is re-expressed from Bantam Books to be "* * * 'whether a prior restraint was necessarily unconstitutional *under all circumstances*' ". (Emphasis from Bantam Books). The argument in Freedman was that if it was accepted as law that the first showing of a film may be restrained under proper guidelines and judicial protection, the provision for censorship in a Maryland statute was an "invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression". It was there said: "Applying the settled rule of our cases, we hold that a *non-criminal* process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. * * * Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. * * * the procedure must also assure a prompt final judicial decision, to minimize a deterrent effect of an interim and possibly erroneous denial of a license."

But in A Quantity of Books v. Kansas, supra, a Kansas statute authorized the seizure of allegedly obscene books before an adversary determination of their obscenity and their destruction by burning or other

means after that determination. Mr. Justice Brennan, author of that opinion, who also wrote the majority opinions in Marcus v. Property Search Warrant, Bantam Books v. Sullivan, and Freedman v. Maryland, cited those three cases as well as Kingsley Books, and finally determined that the failure to afford an adversary hearing made the procedure leading to the order of seizure of all copies of seven specified novels unconstitutional.

The State relies heavily upon Kingsley Books v. Brown, supra. Kingsley Books is a much misunderstood opinion. First, that case did not involve prior restraint without an adversary hearing although the language of the United States Supreme Court may lead one to believe such to be the case. There a petition was filed by the chief legal officer of the City of New York to enjoin several defendants from distributing a series of allegedly obscene booklets. No restraint was sought in that case except after an adversary hearing in response to the rule nisi, issued with the notice of the suit for injunctive relief, to show cause within four days why the defendants should not be enjoined pendente lite from distributing the books. The state court concisely held that "* * * when the court — *after an adversary hearing* — is able to read and examine the publications objected to, and acts judicially to enjoin their distribution, it is apparent that there is no 'previous restraint' in the genuine historical and constitutional sense of that term". Burke v. Kingsley Books, 208 Misc. 150, 142 N.Y.S. 2d 735 (1955). The United States Supreme Court in Kingsley recognized that the adversary hearing under the rule to show

cause was dispensed with because the "appellants consented to the granting of an injunction, pendente lite and did not bring the matter to issue promptly, as was their right under subdivision 2 of the challenged section, which provides that the person sought to be enjoined 'shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial' ". The protection of the preliminary adversary hearing before even a temporary restraining order could issue, a requirement of joinder of issue for final determination within one day after issue was joined, and the requirement that judgment be rendered within two days were actually the basis for the holding in Kingsley that reasonable safeguards were afforded for protection of First Amendment rights in that statutory scheme for control of obscenity.

In State v. Eros Cinema, supra, which I authored, this court found that there was no way to preserve the best evidence in a criminal prosecution for exhibiting an obscene film except upon seizure of the film under search warrant. For this reason we held that such a seizure is permissible in the limited quantity necessary where there are proper safeguards for establishing probable cause and for providing quick judicial determination on the merits, review, and final judgment. Our reason for believing this brief ex parte seizure, or, if you will, temporary suppression, was necessary in that criminal prosecution does not exist in this civil suit to abate a nuisance. We found there that in a criminal prosecution the Fifth Amendment right against self incrimination would not permit a sub-

poena duces tecum. However, in the instant civil action to abate a nuisance, the district attorney used the device of a subpoena duces tecum to obtain material he desired as evidence in this proceeding. The compelling reasons for permitting a seizure under a constitutional warrant as provided in the Fourth Amendment do not exist in a proceeding such as this not only for suppression of the showing of the particular film alleged to be obscene but for the closing of the theatre in which it is shown. In fact, the order of the court did nothing to preserve the evidence. The order of the court enforced without a hearing a total suppression of these defendants' right of expression in the theatre. Although emergency under an allegation of immediate threat to the morals of the community, i. e., the concept of clear and present danger, is not an exception to the requirements for notice and hearing before restraint, in the case at hand it is well to note that the motion picture alleged to be obscene had been exhibited for several weeks before action was taken by the district attorney, who had received numerous complaints upon which he had not previously acted. Time was not in fact as well as in law an element essential for consideration in issuing the order of suppression here.

A thorough consideration of these cases leads me to conclude that *in a civil proceeding to abate an obscene expression as a nuisance there can be no prior restraint without an adversary judicial adjudication.*

For the purpose of argument only, I then move to the alternative attack in connection with prior re-

straint, that if prior restraint were permitted by the statutes in such a case as this, the statutes are unconstitutional since the safeguards which must follow as set forth in numerous United States Supreme Court opinions are not provided in the statutes. This contention is correct. In Marcus, Bantam Books, Freedman A Quantity of Books, and Lee Art Theatre v. Virginia 392 U.S. 638, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), the overriding holding is that whether under a licensing statute, a statute for injunction or destruction, or a criminal prosecution, there can be no prior restrain without notice and hearing by seizure under search warrant or suppression by other method *unless* immediate judicial determination in an adversary hearing is available and a speedy final judicial determination of the issue is provided.

Under the statutes at hand, the first hearing on the question of the actual obscenity of the suppressed expression is by rule to show cause five days after the initial suppression. Since the form of suppression is injunction, under our law there can be no suspensive appeal from the trial court's ruling. C.C.P. Art. 3612. An appeal from a final injunction is subject to the same delays as other appeals. Because of these delays, in a case such as this great injustice may be done if the expression originally suppressed by temporary restraining order is finally found to be a constitutionally protected expression. The motion picture here alleged to be obscene has been suppressed now for almost a year and a half. We said in Eros Cinema, supra that we would require a hearing into the obscenity issue under seizure by search warrant within two da

and a judgment at the trial court level 24 hours thereafter, and that this court would treat application for writs from an adverse ruling as remedial, thus assuring a speedy final determination of the issue. Here in this civil proceeding none of these protections are afforded although the consequences which flow from the suppression may actually be graver and more onerous than those under our criminal statute. Even if prior restraint were permissible, the statute would be unconstitutional because of not affording the safeguards for protection of First Amendment rights.

I have reserved for last consideration in this discussion of prior restraint the most serious constitutional defect in the statutes. This consideration arises under the original and historical application of the doctrine of prior restraint.

Actually, prior restraint is the context of its historical origin and as discussed in most early jurisprudence is defined as that restraint or suppression of an expression without judicial determination of the right to suppress *before any publication, any exhibition, any communication of that expression.* The prohibition against prior restraint predates even our Bill of Rights, in 70 Columbia L.Rev. 1403, 1409 Blackstone's theory of the prohibition against previous restraint involving freedom of the press is discussed. Blackstone took the view that there could be no previous restraints upon publications, saying: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he pub-

lishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." I agree with the conclusion of the writer of that article that Blackstone's distinction between prior restraints against publication and punishment subsequent to publication has survived and is applicable to the present legal doctrine. The question under this historical and very limited expression of the doctrine prohibiting prior restraint is whether an evidentiary hearing and judicial determination are required before an expression which is obscene can be suppressed, prohibited, or restrained even before it is published, exhibited, or in any manner communicated. I am compelled to answer that, under this limited definition of prior restraint, suppression cannot be had without notice and a hearing.

In Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), the court in language broader than the issue presented to it gave three examples of exceptions to the application of the doctrine, including attempts to control obscene publications. In Burstyn v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), the court appeared to remove the obscenity exception, and finally in Kingsley Books v. Brown, supra, the court correctly observed that the Near case had not concerned obscenity, and the exception of obscenity was discarded.

The doctrine of prohibiting prior restraint of expression without notice and hearing before the expression is ever published has more validity today than even in much earlier times when it was designed to prohibit

the government from destroying printing presses so there could be no future publication. If these statutes do in fact prohibit expression without notice and hearing even before the expression is communicated, published, or exhibited, they violate the constitutional right of free expression under the First Amendment and our Constitution, Article I, Section 3.

State ex rel. Liversey v. Judge Civil District Court, 34 La.Ann. 741 (1882), was a suit where plaintiff, under an allegation of theretofore published false, malicious, and libelous material, sought an injunction prohibiting the defendants from publishing in any future issue of the newspaper, which he alleged had libeled him, any defamatory material. The court held that because of the constitutional right of free speech, libel and slander were "subjects of punitory, and not merely preventive, remedies. The Constitution rules over all". The injunction was held to be an absolute nullity. The court discussed the historical evaluation of liberty of the press, and stated that to allow an injunction aimed at prohibiting further publication of defamatory material would permit the establishment of a complete censorship over the press so enjoined. Since our court stated so clearly in that case that it cannot enjoin any future publication of defamatory remarks, certainly it should hold it cannot enjoin future publication of any and all expression. Defamatory and obscene speech are both limited exceptions to the First Amendment privilege.

R.S. 13:4712 providing for the mandatory restraining order, the delayed evidentiary hearing, and the final permanent injunction is buttressed by R.S. 13:4714,

which states in pertinent part that if the existence of a nuisance is established under this set of statutes, "an order of abatement shall be entered as part of the judgment in the case, which order *shall direct the effectual closing of the building, structure, land or other place against its use FOR ANY PURPOSE for the period of ONE YEAR* * *".

R.S. 13:4713 provides for contempt proceedings which may be brought ad infinitum carrying fines up to $250.00 and imprisonment up to six months. The fines levied for contempt become liens upon the place which has been closed for all purposes.[4] Therefore the combination of R.S. 13:4712, 4713 and 4714 places "prior restraint" as defined in its most limited sense and in its historical setting — i.e., restraint of expression before it is communicated the first time — upon any future publication, exhibition, or expression whether obscene or not.

Gambling devices and the accoutrements of houses of prostitution, which may be and are controlled under the exercise of the police power, can be legally destroyed so as not to offend again. This, however, affords no basis for analogy with the suppression and

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[4]Under this statute not only is the offensive, obscene material enjoined from exhibition, but none of the movable property or personal effects including equipment used to manufacture, exhibit, or distribute expression may be removed from the premises. And when the premises are closed, these effects along with the immovable closed become subject to the lien for contempt fines and subject to eventual seizure and sale to satisfy contempt judgments. This accomplishes a denial of the application of the doctrine of prohibiting previous restraint upon publication.

regulation of speech and other means of expression.[5] In any regulation touching upon the area of speech and other expression there is a perfectly valid distinction between prior restraint and accountability after abuse. Louisiana Constitution, Article I, Section 3 reads: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; *any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.*" This is a clear and concise statement to our constitutional view that there can be no prior restraint of speech or other expression. One may speak, but when he exercises this privilege, he is accountable if there is an actual abuse of the privilege under one of the few exceptions to total freedom of expression.

R.S. 13:4714 does not permit mere book-burning or film destruction where there is an abuse of the First Amendment privilege. This provision has the effect of sledgehammering the printing press, the camera, the projectors, all the tools of expression in every medium, so that there can be no future expression at all for one who transgresses by crossing the line from free speech to obscenity upon one occasion. We can envision no more fatal defect of prior restraint under

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[5]This particular constitutional defect as well as others in the statutes we consider probably result from the fact that the two situations were analogized. R.S. 13:4711-4717 originally abated the particular public nuisance of houses of prostitution. The amendment of R.S. 13:4711 in 1970 to include obscenity, an exception to the First Amendment right, simply treated obscenity as a nuisance. Plaintiffs have attempted to use a 1968 procedure providing only the minimal safeguards for abatement of houses of prostitution.

its original definition in a statute which attempts to control obscenity than that which is found in R.S. 13:4717. That provision mandates the court to effectively close the avenue of any expression whether or not it abuses the privilege and before it is so determined.

In Kingsley Books v. Brown, supra, a New York statute was upheld by the United States Supreme Court because "* * * as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive". To the contrary under our statute there can be no expression of any kind — good or bad — emanating either from the premises or from the devices on the premises for a period of one year. This is the very essence of the prior restraint condemned by Blackstone, by our Bill of Rights, and by our jurisprudence. Of all the constitutional violations on the face of these statutes, the prior restraint imposed under R.S. 13:4717 is the most offensive.

I find that this particular section of the Revised Statutes does restrict expression not yet found to be an offense and not yet uttered. It is a classic example of prior restraint of speech and expression and is violative of federal and state constitutions.

Moreover, defendants correctly contend that these statutes effect deprivation of property without due process in violation of our Constitution Article I, Section 2. R.S. 13:4712 and 4714 in combination may close the premises where obscenity has been exhibited and deprive the owner of its use if the use of his premises

for exhibition of obscenity was not known and could not have been known by him. R.S. 13:4715 does not give him adequate relief from this deprivation of property. It merely provides that upon posting bond with surety *"in the full value of the property"* and upon certain guarantees he may release the property. The exchange of the full value for the thing is as much a deprivation of property without due process as if the premises were retained. Again, if another obscenity is exhibited even entirely without the owner's knowledge, he must forfeit part of his bond each day of the exhibition. So, R.S. 13:4714, which is an exercise of unconstitutional prior restraint, also falls as a deprivation of property without due process of law.

It may be argued that since the statutory provision that the premises may be closed for use for any purpose for one year was not applied to the defendants in the judgment of injunction, they cannot complain of the constitutionality of such a provision. The defendants have standing to complain of R.S. 13:4714 for several reasons. First, Section 4714 provides that a judgment declaring an expression obscene and the premises a nuisance "may be based on the general reputation" of the premises or of the defendants or of the occupants or of habitual visitors thereto. Therefore, under the express provisions of Section 4717 it cannot be said that these defendants are not aggrieved by any judgment which declares that the premises they occupy and the activities they engage in on those premises constitute a nuisance. According to R.S. 13:4717 they may be adjudged guilty of operating a nuisance upon submission of the judgment in this case as proof

of reputation. Certainly the judgment can under Section 4717 constitute some evidence in the future. Therefore, the judgment has a chilling effect upon the defendants' right to make any expression whether constitutionally protected or not, for fear of contempt penalties and further declaration of the premises as a nuisance.

However, the more pressing reason for recognizing defendants' right to contest the constitutionality of R.S. 13:4714 is found in the trial judge's reasons for judgment. There it was repeatedly stated by the judge that if the defendants were brought back into court for showing another moving picture of the same type as "The Stewardesses", the theatre would be closed for one year. The judge's final statement for reasons was: "But you know what the penalty is going to be if you show another one and come back and if it is shown that it is this same type of film, Mr. Carmody." Defendants are entitled to attack the constitutionality of this particular statute, and that provision is in absolute contravention of the principle of prior restraint upon expression and is also a deprivation of property without due process of law.

Defendants also allege that R.S. 13:4717 is unconstitutional. It reads: "On the hearing in any action filed under the provisions of R.S. 13:4711 through 13:4717 evidence of the general reputation of the building, structure, land or other place or of the defendant or of the occupants thereof or habitual visitors thereto shall be admissible, and *judgment may be based on the general reputation so proven.*" I am very doubt-

ful of the constitutionality of this provision in regard to a determination of what constitutes *any* public nuisance. Presumptions are provided for at law, and presumptions lie with one party or the other in certain civil proceedings. Burdens of proof shift according to the nature of the proceedings and the nature of the proof required in the proceeding. However, we can find no expression of law permitting a judgment to be based solely on the general reputation of the parties to the suit or of the things involved. Certainly no judgment affecting the right of free speech could be based on general reputation. Proof that a person is repeatedly obscene in expression, that a press repeatedly has printed obscenities, that a building has repeatedly housed obscenity is not proof susceptible of sustaining a judgment that another expression from one of these is itself an obscenity. One may be punished for uttering obscenities, one may be held in contempt for refusing to refrain from circulating that which is obscene, but one cannot be adjudged guilty of a new obscenity on reputation alone. R.S. 13:4717, which is part of the whole general statutory scheme for the action against these defendants, is unconstitutional.

I move finally to what the majority lists as the second reason for reconsideration of this matter on rehearing. This is the contention that the wrong standard for determining whether the picture was obscene was offered in proof and used in the trial court for the determination of its judgment. I would have expected to be required to make long and detailed discourse upon the law to establish that *a national standard* and *NOT a local community standard* is constitutionally required.

However, the majority opinion quickly agrees with me that the United States Supreme Court in Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793, stated unequivocally "that by 'contemporary community standard' in the Roth-Alberts test, it meant the 'national standard'; consequently that the constitutional status of an allegedly obscene work *must* be determined on the basis of a *national standard.*" It is amazing then to see the majority, after this acknowledgment of positive constitutional law, avoid its application in the case at hand. It seems to do so under several totally non-legal postulates. The majority states that it is convinced there is no way of proving the national standard in these cases. It then, contrary to the constitutional requirements in proceeding for determining whether or not material is obscene, shifts the burden of proof to the defendant for establishing whether this expression is obscene under the national standard. The majority then condemns the U. S. Supreme Court for not laying down the procedural rules governing the evidence required for determining whether or not material is obscene under national standards. That majority would, I believe, ordinarily condemn federal encroachment on the states' right to establish purely procedural rules governing the evidentiary process in the states trial courts. Finally, the majority concludes the Jacobellis case is authority for the proposition that only the United States Supreme Court is qualified to apply constitutional standards and criteria to determine what is obscene. United States Supreme Court decisions with minor exceptions have dealt entirely with the right of the states to control obscenity. Only a few cases have dealt with federal control of obscenity

such as through the mail or ports of entry. The Supreme Court in the cases cited by the majority and by me in this dissent deal exclusively with the limitations placed upon states in exercising control over the First Amendment privilege through local regulation of obscenity. I cannot fathom how the majority has determined that the United States Supreme Court has reserved for itself or the federal system alone a determination of the constitutionality of the states' attempts to regulate obscenity. Surely, that court is the final arbitor but just as surely the highest court of a state cannot disregard its responsibility and "check" the matter to the United States Supreme Court.

Moreover, I must note here that our court cannot bypass the question of the proper standard for the case at hand for the legislature under this statute permits the abatement of obscenity statewide. The effects of the judgment here upon defendants' future right of expression throughout the state requires that the minimal standards for determining obscenity would be that of the entire state community. Certainly the standard cannot be that applied by the majority, i. e., what a majority of seven judges determine to be obscene under their individual moral standards.

I do not reach the question of whether or not the movie abated was obscene. My determination that these statutes are totally deficient in the constitutional requirements for regulation of expression that is obscene, and further that the actual application of the statutes here is unconstitutional, demands a declaration of a denial of due process. Obscenity as a fact,

must be pretermitted. For these reasons, I respectfull
dissent.

ON REHEARING

BARHAM, Justice (dissenting with additional re
sons).

The defendants also attack the constitutionality
these provisions on the basis that the amendatory ac
were insufficiently titled to permit the changes co
tained in the body of those acts. As previously state
from 1918 until 1960 R.S. 13:4711 defined only prostit
tion as a nuisance, and it provided only that this nu
sance could be enjoined and abated under provisio
of R.S. 13:4711-4717. Although these several statut
appear under Chapter 32, Part I, "Abatement of Pu
lic Nuisances", Subpart A, "Houses of Prostitution
they have never been amended by chapter, part,
subpart, but only by individual section or statute.

Act 201 of 1960 was the first amendment address
to any section or provision of Subpart A, "Houses
Prostitution". The title of that act read: "To ame
and re-enact Section 4711 of Title 13 of the Revised St
utes of Louisiana of 1950, relative to buildings, lan
etc., declared nuisances." Under that very limited ti
places where obscenity was expressed or communic
ed were declared to be a nuisance along with plac
of prostitution. Obviously, the title to the 1960
amending R.S. 13:4711 was not sufficiently broad
give notice to the legislators that they were about

place in the category of nuisance an exception to the First Amendment privilege of free public expression.

In 1968 the Legislature attempted to amend and re-enact two others of these seven provisions in addition to amending a provision dealing with the abatement of gambling. The title to Act 362 of 1968 read: "To amend and re-enact Sections 4712, 4716 and 4722 of Title 13 of the Louisiana Revised Statutes of 1950, all relative to injunction to abate public nuisances, to provide with respect to the persons authorized to maintain actions in the courts to enjoin and abate the public nuisances of *gambling and prostitution,* and to provide with respect to the fees charged by the clerk of court and prosecuting attorney and disposition of the fines collected in actions to enjoin and abate the public nuisance of prostitution."

Under the declaration of this title that the purpose of the act was to provide for the enjoining and abating of the public nuisances of gambling and prostitution, R.S. 13:4712 was then amended to read as it reads now. That section provides the procedure for the temporary and permanent enjoining and abating of a nuisance. However, the title of the act clearly indicated to the legislators that the only public nuisances to be controlled were gambling (R.S. 13:4722, not involved in the statutes here) and *prostitution.* The title by its strict limitation to gambling and *prostitution* would not permit the body of the act to define and control as a nuisance places dispensing obscenities through some form of public expression. Since the 1968 Legislature could not under the title of the amendatory act

re-enact R.S. 13:4712 for the purpose of controlling ob-
scenity, that section cannot now be used to control ob-
scenity as a nuisance.

Finally in 1970 Section 4711, which the 1960 act at-
tempted to amend to include obscenity, was again
amended and re-enacted along with Section 4715. The
title of the amending act, Act 451 of 1970, is sufficiently
descriptive and broad to include obscenity in the defini-
tion of a nuisance and to declare the premises where
it exists an abatable nuisance along with places of pros-
titution. However, this subsequent amendment of Sec-
tion 4711 alone and without reference to the other pro-
visions, more particularly Section 4712, did not cure
the defect in Act 362 of 1968 which amended and re-
enacted R.S. 13:4712. Obscenity could not have been
and was not a nuisance in 1968 because of the 1968
act's defective title. Moreover, the defect in the 1968
title of confining the procedures for enjoining and abat-
ing nuisances under Section 4711 to prostitution did
not and does not now permit that section to govern
actions attempting to control any nuisance other than
prostitution. It is the 1968 Legislature which had to
have notice in the title of Act 362 of the extent of the
amending provision. There was no way for the 1968
Legislature to be on notice that rights of speech and
expression would be subject to the same police regula-
tions as a common nuisance such as prostitution and
gambling which were named in the title.

The 1968 amendment to R.S. 13:4712 referred to the
nuisances defined in R.S. 13:4711, but, because of rea-
sons previously noted, R.S. 13:4711 at that time cou

not and did not legally define obscenity as a nuisance along with prostitution. R.S. 13:4712 has never since been amended, and to this day it remains only a vehicle for enjoining and abating places of prostitution. The title of the amendatory act to R.S. 13:4712 is defective for more than its lack of definitiveness or broadness; the title is actually misleading in that it specifically expresses only that the purpose of the act is to prescribe a procedure for the control of the public nuisance prostitution.

Remembering that the Legislature could have amended the entire part or subpart containing these several sections of the Revised Statutes and that it chose rather to amend them section by section, I compare the failure of title in the acts amending these provisions with this Court's recent pronouncement of failure of title in State v. Welkner, 259 La. 815, 253 So.2d 192 (1971). Since at least some reference was made to chapter and part as well as to subpart in the title of the act we examined in Welkner, it may be said by comparison that the defect in title there was not nearly so obvious or so misleading as in the present instance. This Court cited with approval Southern Hide Co. v. Best, 176 La. 347, 145 So. 682 (1933), and said that no new matter could be enacted in the amendment of specific provisions of an indicated statutory section unless "the amendment is germane to the subject of the original act, and is embraced within the title of such amended act".

Obscenity could not have been included under the title of the original act of 1918 or under the title of

the act of 1960 amending R.S. 13:4711. The title to the original act was not sufficient to incorporate within the present section R.S. 13:4712 the control of obscene expression. Reference in the amendatory act of 1968 to the statute sought to be amended could in no way give notice to the legislators that obscenity was to be included in the controls provided in that act. Additionally, the title of the amendatory act excluded obscenity from control under the actions provided in the act.

I repeat: Failure of the 1968 act to include obscenity within its provisions has not been cured by the amendment to a separate section in 1970. It cannot be presumed that the 1968 Legislature would apply harsh police power procedures permissible for control of prostitution to control of this exception to constitutionally protected speech. The 1970 Legislature provided no procedures for the abatement of obscenity. It only declared it to be an abatable nuisance. The limiting of the 1970 legislation to the specific section R.S. 13:4711 could not give notice that any other section not named would be amended so drastically as would be necessary to cure the title defect in Act 362 of 1968.

I hold with the defendants' contention that obscenity cannot be controlled by the procedure for abatement and injunction of prostitution of R.S. 13:4712 because the title of the amending act did not include obscenity and expressly limited that provision's effect to prostitution. Therefore there are no provisions for actions or procedures to enjoin or abate places permitting the expression of obscenities. R.S. 13:4712 is unconstitutional as a procedure for controlling obscenity.

I respectfully dissent additionally upon this ground.

ON REHEARING

TATE, Justice (dissenting).

I concur fully in my brother BARHAM's principal dissent.

Our public nuisance statute is simply too blunt an instrument of regulation for the sensitive area of First Amendment freedoms. It permits, so to speak, the destruction of the printing press, as well as suppression of the book. The history of ten centuries of struggle for freedom of speech and press illustrates why statutes such as the present offend our Constitution, where the statutory sledge hammer may easily be used to smash protected expression as well as unprotected, without discrimination between them.

The motion picture under review is a prime example. The majority denotes it as "hard core pornography". With due respect, under contemporary standards (and probably those of previous generations), this is not in accordance with commonly accepted meanings of the term.

The motion picture in question deals obsessively with sex, an obsession shared (to judge from box office tallies) by large numbers of people of our present-day society. It has a thin story line, but it does possess one. Its indirect depiction of sexual activities leaves

little to the imagination; anyone over the age of twelve or so would guess what is involved.

However, hard core pornography, as is commonly understood, is something that leaves nothing to the imagination: a child of eight would know what the adults were doing (although perhaps not *why*). Hard core pornography is such as that involved in In Re Haggerty 257 La. 1, 241 So.2d 469 (1970), which explicitly depicted in detail sexual activity. Such showings commonly do not have any pretense at a story line, for instance, the close-ups of one sexual act after another are shown.

In the present case, the motion picture "The Stewardesses" was shown in firstrun cinemas all over the nation. It attempted by exaggeration to illustrate a view of the life of airline stewardesses, involving the use of sex to fill their (depictedly) empty lives between flights. Aside from some of the comedy of the exaggeration, one could sense as a theme of the picture the futility and emptiness of such a way of life. For instance, the picture ends with the suicide of one of the heroines.

This "X" rated movie is certainly not family entertainment (nor are young people below the age of 18 permitted to see it). It is not the sort of show with which I would choose to while away my leisure hours (although millions of Americans apparently do find such a show entertaining). It has no more redeeming social value as entertainment than, say, a New Orleans Saints football game. However, as the senior members

of our court may remember, it is certainly far less explicit and pornographic than many of the shows on Bourbon Street in the New Orleans of an earlier era (and perhaps of now, for all I know).

That our nuisance statute can be used to suppress a motion picture like this, and moreover to threaten the theatre itself with complete closing for a year because it showed it, illustrates why such a nuisance statute is unconstitutional insofar as sought to be applied in the sensitive area of the First Amendment freedoms. Adults have in general a right to see and read what they wish to; to prohibit a showing or reading because it offends, not contemporary standards but those of a previous generation, is not permitted by our state and federal constitutions.

I therefore respectfully dissent.

APPENDIX E

LF STATES THEATRES OF LOUISIANA, INC., al., petitioners, v. LOUISIANA and the Parish of Caddo. No. 72-1221.

acts and opinion, La.App., 255 So.2d 857; 264 La. 270 So.2d 547.

une 25, 1973. On petition for writ of certiorari to Supreme Court of Louisiana. Petition for writ of tiorari granted, judgment vacated, and case re-nded to the Supreme Court of Louisiana for further sideration in light of Miller v. California, ____ U.S. _, 93 S.Ct. 2607, 36 L.Ed.2d ____ (1973); Paris Adult eatre I v. Slaton, ____ U.S. ____, 93 S.Ct. 2628, 36 d.2d ____ (1973); Kaplan v. California, ____ U.S. _, 93 S.Ct. 2680, 36 L.Ed.2d ____ (1973); U.S. v. 12 ft. Reels of Super 8mm Film, ____ U.S. ____, 93 t. 2665, 36 L.Ed.2d ____ (1973); U.S. v. Orito, ____ . ____, 93 S.Ct. 2674, 36 L.Ed.2d ____ (1973); Heller N. Y., ____ U.S. ____, 93 S.Ct. 2789, 36 L.Ed.2d ____ 73); Roaden v. Ky., ____ U.S. ____, 93 S.Ct. 2796, L.Ed.2d ____ (1973); and Alexander v. Virginia, ____ . ____, 93 S.Ct. 2803, 36 L.Ed.2d ____ (1973).

Mr. Justice DOUGLAS would grant certiorari and erse judgment. See Miller v. California, *ante* (dis-ting opinion of Justice Douglas).

Mr. Justice BRENNAN, joined by Mr. Justice STE-ART and Mr. Justice MARSHALL, would grant cer-rari, vacate judgment, and remand for further pro-edings not inconsistent with his dissent in Paris ult Theatre I v. Slaton, *ante*. See Miller v. California, te (dissenting opinion of Justice Brennan).

APPENDIX F

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA AND
THE PARISH OF CADDO

versus No. 52,132

GULF STATES THEATRES OF LOUISIANA, INC.,
ET AL

ON REMAND FROM THE UNITED STATES
SUPREME COURT

CULPEPPER, Justice Ad Hoc

The State of Louisiana and the Parish of Caddo initiated proceedings seeking to enjoin the exhibition of the motion picture "The Stewardesses" under the Abatement of Nuisances Statute, R.S. 13:4711-17, alleging the film to be obscene.

Defendants challenge the constitutionality of the statute under which the suit was instituted and deny that the film is obscene.

After hearing and rehearing in this Court, judgment was entered permanently enjoining defendants from showing any version of the motion picture within Caddo Parish, 264 La. 44, 270 So.2d 547. Certiorari was granted by the United States Supreme Court, 93 S.Ct. 3063. Thereafter, that Court issued its mandate which

ordered our judgment vacated and remanded the cause to us for further consideration in the light of Miller v. California, 93 S.Ct. 2607 (1973); Paris Adult Theatre I v. Slaton, 93 S.Ct. 2628 (1973); Kaplan v. California, 93 S.Ct. 2680 (1973); United States v. 12 200-ft. Reels of Super 8 mm Film, 93 S.Ct. 2665 (1973); United States v. Orito, 93 S.Ct. 2674 (1973); Heller v. New York, 93 S.Ct. 2789 (1973); Roaden v. Kentucky, 93 S.Ct. 2796 (1973); and Alexander v. Virginia, 93 S.Ct. 2803 (1973).

A hearing has been held in this Court on the remand. Defendants again urge the unconstitutionality of R.S. 13:4711-17 and assert that our prior holding anent obscenity is erroneous.

We have, this date, declared R.S. 14:106 A (2) unconstitutional as violative of the First and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2 and 3 of the Constitution of the State of Louisiana in the cases of State v. Shreveport News Agency, Inc., No. 53,985, ____ So.2d ____ (La. S. Ct. 1973) and State v. McNutt, No. 52,489, ____ So. 2d ____ (La. S. Ct. 1973); and R.S. 13:4711-4717 unconstitutional insofar as the provisions therein attempt to regulate obscenity in the case of Gulf States Theatres of Louisiana Incorporated v. John A. Richardson and George W. D'Artois, No. 54,044, ____ So.2d ____ (La. S. Ct. 1973).

It necessarily follows for the reasons assigned in those cases that the judgment of this Court previously rendered enjoining defendants from showing

"The Stewardesses" in Caddo Parish must be reversed and set aside.

For the reasons assigned, the judgment of this Court rendered on rehearing on December 18, 1972 is set aside; and plaintiffs' suit is dismissed.

Sanders, C. J., dissents for the reasons assigned by him in Gulf States Theatres of Louisiana, Inc. v. John A. Richardson and George W. D'Artois, No. 54,044

Summers, J., dissents and with assign reasons.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA AND
THE PARISH OF CADDO

versus No. 52,132

GULF STATES THEATRES OF LOUISIANA, INC., ET AL

SUMMERS, Justice (dissenting).

I dissent, adhering to the reasons assigned in the original opinion of this Court. See also State v. Rhodes, 283 So. 2d 351 (Fla. 1973), and my dissent in State v. Shreveport News Agency, Inc., No. 53,985, rendered December 3, 1973.

APPENDIX G

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 11th day of January, 1974, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * * *

REHEARINGS REFUSED:

* * * *

52,489 State v. McNutt
SANDERS, C.J., SUMMERS and CULPEPPER, J.J., dissent from denial of rehearing.
MARCUS, JR., recused.

* * * *

53,985 State v. Shreveport News Agency
SANDERS, C.J., SUMMERS and MARCUS, J.J., dissent from denial of rehearing.

54,044 Gulf States Theatres v. Richardson and D'Artois
SANDERS, C.J., SUMMERS and MARCUS, J.J., dissent from denial of rehearing.

* * * *

52,132 State et al v. Gulf States Theaters (On Remand)
SANDERS, C.J., SUMMERS, and MARCUS, J.J., dissent from denial of rehearing.

* * * *

APPENDIX H

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA AND
PARISH OF CADDO

versus No. 52,132

GULF STATES THEATRES OF LOUISIANA, INC.

ORDER FOR STAY AND RECALL OF JUDGMENT

On consideration of the Petition, Motion and Application of the State of Louisiana and the Parish of Caddo in the above numbered and entitled cause:

IT IS ORDERED that the execution and enforcement of the Judgment and Decree rendered in the above entitled and numbered cause be, and it is hereby stayed, and arrested pending and until the 11th day of April, 1974, in order to permit the State of Louisiana and the Parish of Caddo to seek a Writ of Certiorari from the United States Supreme Court and, in the event that the State of Louisiana and the Parish of Caddo shall timely apply to said Court for Writs of Certiorari or review, then it is ordered that the execution and mandate, and enforcement of the Judgment and Decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed and arrested until the Supreme Court of the United States shall have made its final disposition of this case.

New Orleans, Louisiana, this 14th day of January, 1974.

/s/ JOE W. SANDERS
CHIEF JUSTICE, SUPREME
COURT OF LOUISIANA

APPENDIX I

TRANSCRIBED ORAL OPINION OF JAMES E. CLARK, JUDGE, FIRST JUDICIAL DISTRICT COURT, CADDO PARISH, RENDERED OCTOBER 12, 1973

COURT'S OPINION

THE COURT:

First of all, I have previously expressed to both counel my high regard for their ability. The term of the eferences made to four days — by the clock we have pent the equivalent of five days trying this litigation, hich is a serious litigation. It is not approached by he Court in a light or humorous vein at all.

To complete the record and, as Mr. Wittmann so orrectly quoted me, I personally found the movie borng. I was repelled. I certainly was not stimulated or urned on, if that is a definition — which I don't believe t is. I found it depressing as did practically all of he lay witnesses who testified in the case. I cannot et myself up, nor do I for one moment set myself p as an expert on what is artistic value; nor will let my own personal thoughts dominate any decision s to how the average person would react after seeing

such a movie or how they would view it; that is, do they consider it as having a serious artistic value or serious political, scientific or literary value. I simply do not conceive it my job to let my personal thoughts override evidence and testimony as presented in court. It would be far easier for me if a jury would decide this question, rather than me. I could just remove all possible thought of responsibility and go merrily along the way. But I am not given that position. Therefore, I have to make the final decision.

I am satisfied that there were some witnesses for the defendant in rule and plaintiffs in reconvention who would go far beyond the average standard of people in this parish to proscribe the showing of certain films or the publication of certain works. I am equally satisfied that there are many witnesses, some witnesses, on the part of the plaintiffs in rule, who have placed very few, if any, restrictions under their personal concepts and definitions of, for example, as they define in their own opinion the term "pornography". I am also satisfied that some of the witnesses for the plaintiffs in rule at least made it clear to the Court that in their opinion this particular film was or had its appeal primarily to a more sophisticated group. I believe that term was possibly used by Reverend Paul, if I am not badly mistaken. Even Professor Ragsdale used the term," the appeal of this movie would be more to a selective rather than a general audience. Virtually all of them agreed it certainly should not be shown on television or for general audience viewing. They felt that it was the public whom they wanted to protect by not letting it be shown on television, would be properly protected not by a first amendment protection

but by a rating made on the film by the industry itself. I have to consider all of that with all of their testimony, and at the same time consider the testimony of the other side's witnesses, some of whom would not at all agree that first amendment protection should extend, well, virtually, to anything if they happened to disagree with it.

Out of all of this and trying to carefully weigh the sentiments expressed and the views expressed, I do not want to single out an individual witness as being — because I do not rely on the testimony of any individual witness, but I will state for you gentlemen and for the record that I was most impressed by the testimony of Mr. Sinclair Kouns who holds a high elective position, who probably is in better contact with the average citizens of this community than almost anyone I know offhand.

Mr. Koun's testimony is a matter of record, and I frankly believe that Mr. Kouns went to the movie with an open mind. I was impressed by his testimony that the committees with whom he worked have not gone out and tried to ban them. They have tried to take a fair and reasonable approach. Part of the problem was the testimony of all the witnesses that they are having to give, and it is the way it ought to be. They are having to give their personal reactions to the film based on their own personal concepts, some of these concepts being concepts of law. Mr. Lane Crockett, for example, — as long as the Court hasn't ruled it obscene, as long as there is not depiction of certain scenes of the genitals showing, which was true of many other witnesses called by plaintiffs in rule.

After considering all of these and the arguments of counsel, I reject the demands for injunctive relief on the part of plaintiffs in rule and grant the request for and plaintiffs in reconvention.

In this connection, however, gentlemen, I would appreciate — and I do solicit your assistance. I have no intention of closing down the Don Theater in Shreveport, Louisiana.

MR. LINDSAY:

We have not asked for that.

THE COURT:

I did not understand that to be the request. I do enjoin defendants in rule from playing the movie Last Tango in Paris. This is a preliminary injunction, I believe, gentlemen, unless you can enlighten me. And that is what I need.

MR. LINDSAY:

It is permanent.

MR. WITTMANN:

He has asked for permanent. I don't believe he is entitled to it. He is only entitled to preliminary relief.

MR. LINDSAY:

No. Under 13:4711 and the statutes following that we are entitled to a permanent injunction, permanently enjoining the exhibition of the particular picture. It is set forth in that statute, and as interpreted by the Courts of Appeal in South Louisiana in some city to oppose pornography.

MR. WITTMANN:

I do not think he is entitled to a permanent injunction on a preliminary hearing, Your Honor. I especially disagree with that. I think the hearing we have been conducting is of a summary nature that involves only the issuance of a preliminary injunction. And I do not think he is entitled to permanent injunction.

MR. LINDSAY:

No. May I get the statute for you? I may have it here.

THE COURT:

If you don't have it I would like to offer you my key to my office, because I would like to see that the record is complete and the appellate court can take such action as they deem appropriate.

MR. BARLOW:

Your Honor, we would like to submit a very rough draft of an order pending the determination of whether it is permanent or preliminary.

THE COURT:

I will say "rough" is a very descriptive term.

MR. BARLOW:

I did it during argument, Your Honor.

THE COURT:

Do you have it, Mr. Lindsay? I have the statute in my office.

MR. LINDSAY:

Yes, sir, I have it here. I was just hoping I could find it quickly, but I didn't. I mean — starts at 47:11 and then continues on. If I may say by way of interpretation, this statute deals in terms of a temporary injunction which would be the same as a temporary restraining order, but it is not phrased that way.

THE COURT:

Would you mind getting that? This is a statutory provision, if I read it correctly, from Section 47:12 to enjoin and abate the nuisance perpetually.

MR. LINDSAY:

Yes, sir, perpetually, permanently.

THE COURT:

That is precisely how it reads, gentlemen. We are not here dealing with the ordinary injunctive article of the Code of Civil Procedure.

MR. BARLOW:

I might add, too, that injunctions are by their nature summary proceedings, as Your Honor well knows.

THE COURT:

I realize that, Mr. Barlow. There is a problem in an ordinary civil action which has been bandied back and forth by lawyers and judges a long time. This statutory authority is of specific nature and would control it in any event.

Did you find the language, Mr. Wittmann? If you find it is different I would certainly appreciate your calling it to my attention.

MR. LINDSAY:

I might point out to Your Honor that the copy of the statute I furnished you is a copy of the printed statute which Mr. Madison and Mr. Carmody furnished me as being the law of the State.

MR. WITTMANN:

Your Honor, the statute does talk in terms of a perpetual injunction, whatever that may be.

THE COURT:

It is a statutorily created.

MR. WITTMANN:

I appreciate that.

THE COURT:

And I think we are proceeding under the right statute.

MR. WITTMANN:

I would, however, request that in view of the fact that we have a picture running on the screen tonight —

THE COURT:

(Interrupting) I think I am a step ahead of you. Perhaps I am a step ahead of you, perhaps I am not. To complete the opinion, it will be a perpetual injunction directed against defendants in rule for the

showing of the film in question in this litigation, but not to commence until — as I understand it — and may I inquire — the next feature is scheduled to commence at some nine o'clock?

MR. WITTMANN:
About that.

THE COURT:
Something of that sort? It is not to commence until the showing of the feature — it is now eight o'clock — until the showing of the feature now in progress has been completed, but at the moment that it has completed the normal regular timed run the injunction is then to take effect, so there will be no showing under the injunction once the present showing has been concluded, which I understand to be at around nine p.m.

MR. WITTMANN:
I will ask you to allow — I was going to ask you to let us wait until tomorrow, not make it effective until tomorrow so we can have a new film on the screen tomorrow and radio advertisements, and so forth.

THE COURT:
Mr. Wittmann, I think that in view of the fact that we have been at it for four days that I am going to let my ruling stand. There will be no more showings after the one that is currently in progress now, that is due to terminate at about nine p. m.

MR. WITTMANN:

Could I speak with Mr. Gianfort for just one moment?

THE COURT:

Yes, sir.

MR. BARLOW:

Your Honor, we have enlisted Mrs. Brown to type that up this evening, if Your Honor won't mind waiting until —

MR. WITTMANN:

(Interrupting) Your Honor, Mr. Gianfort says he — I don't want to belabour the point, but he says people have bought tickets who came in the middle of the show after it started and have no way of seeing the whole show, and they are going to be raising a lot of cane over there if they are not able to see the completion of it.

THE COURT:

Let me ask this question: You have two more showings tonight, Mr. Gianfort?

MR. GIANFORT:

Just two tonight; one at seven o'clock and one that starts at nine-thirty, but our feature went on at seven o'clock and we have been selling tickets since then. So these people have no way of seeing all of the show that came in after seven o'clock.

THE COURT:
I am not going to —

MR. GIANFORT:
(Interrupting) It is going to be a hardship on thes people. They can only see half the show.

THE COURT:
Of course, under my ruling I don't think they ough to be seeing the show at all, and I was attemptin to let those who were there now at least finish viewin it. I realize — let me make this statement very clea — in this type of litigation there will be many wh will be totally unsatisfied with the Court's ruling. would expect this. There will be many others who wi be delighted with the ruling. But I want it known an made crystal clear I am not and I have not tried t decide this case on the basis of any popularity co test. I am truly on the horns of a dilemma. That i a very small dilemma really and truly, in view of th overall major things we have been here for all thi week. And that is the question of those few people wh came in late to take away — actually, the movie ha been enjoined. The movie will be enjoined commen ing when the present showing is terminated. There wi be no showing after that is stopped. And those peop may curse me or do whatever they want to. That my ruling. The movie is enjoined, commencing wi the nine o'clock or whatever the regular schedul showing is.

MR. WITTMANN:
Nine-thirty, I think.

THE COURT:

Nine-thirty. Now, as I understand it, you are going to have this formal judgment prepared. We can remain to sign it here in open court if that is desirable.

MR. WITTMANN:

Your Honor, may I ask one thing at this point? I certainly understand the import of Your Honor's ruling, but do I take it to mean that Your Honor finds — I would like you to state if you would for the record your specific findings on each one of the three tests prescribed by Miller, if I may.

THE COURT:

I will be glad to, Mr. Wittmann, if you actually think it might serve a useful purpose.

MR. WITTMANN:

I think it would, Your Honor. I will tell you in advance what I have in mind so there won't be any misunderstanding between us. I think that Your Honor's ruling here tonight in Shreveport, Louisiana, is the first of its kind in the country.

THE COURT:

I certainly don't intend and don't want to make any headlines. That is not my desire.

MR. WITTMANN:

I think you are going to have that anyway.

THE COURT:

So be it.

MR. WITTMANN:

None of these people work for me but they have been here all week and they have been writing things. And, frankly, Your Honor, we intended as soon as Your Honor has completed the entering of the order to give notice of intention to apply for Writs of certiorari and mandamus to the Louisiana Supreme Court, and we think it would be helpful to that court to have available to it the statement of Your Honor's reasons with respect to the Miller standard, because, as Your Honor knows, the Louisiana Supreme Court has in State of Louisiana versus Shreveport News Agency granted writs. And in that matter Chief Justice Sanders has said the case rests here obviously in Shreveport; that by granting this writ the Caddo Parish District Attorney and defense counsel will be afforded an opportunity to present their views to the Court on this issue, referring to the constitutionality of the obscenity statute. We think that in view of the Supreme Court's prior actions that there is a great likelihood that they will grant writs in this case, and we would like to have a clear expression from Your Honor.

THE COURT:

My expression, Mr. Wittmann, is this: That I would hope the Supreme Court would view the film and consider all of the evidence from all of the witnesses. I have already said — I have tried to to avoid setting forth strictly my own personal thoughts, but I have applied to the testimony of the witnesses, to the individual witnesses, such weight as I felt I could apply to part of, some of their testimony and more perhaps

to others, taking into account the position of others. There are other testimonies who would relate it to the specific questions of counsel. I am satisfied that the evidence is overwhelming from the standpoint of the three prongs of Miller, on each of the three individual prongs of Miller. I don't know how much more explanation I need to give than that. I have not considered it lightly and I have gone back over it and reviewed my trial notes through each witness' testimony, trying to reconcile some statements they would make in some regards and how it would relate to their position on other matters, because I was trying to get a determination of what weight to give these matters. I frankly and personally feel that the use of the explicit scenes and manner in which they are portrayed was the primary and moving purpose of the movie, and would destroy or to some extent largely diminish what artistic value and particularly that from a technical standpoint. Technical aspects don't enter into it, but the serious artistic value ascribed to it by some of your witnesses. That is my belief.

MR. WITTMANN:

I appreciate that, Your Honor.

THE COURT:

That will conclude the opinion.

MR. WITTMANN:

I have one other thing, Your Honor. As I had indicated before, when I asked you for your expression of opinion, that we intended to give the Court and counsel

notice of intention to apply for writs to the Louisiana Supreme Court, and I would like formally for the record to give notice of that intention at this time.

THE COURT:

Do you want to wait until the judgment is formally presented and signed? I think you should.

MR. WITTMANN:

If you think I should I will wait.

THE COURT:

I don't want to jeopardize any of your rights. If you want to move for it prematurely —

MR. WITTMANN:

(Interrupting) No. I will wait. That is all right.

(Whereupon, at 8:05 o'clock p. m. October 12, 1973, court was recessed until 8:30 o'clock p. m. of the same day.)

AFTER RECESS

THE COURT:

Mr. Wittmann, I understand you have no objections to the form, certainly, I am sure, to the substance, but as to the form of the judgment.

MR. WITTMANN:

That is correct, Your Honor.

I understand you have signed the judgment.

THE COURT:

I am signing it now.

All right, Mr. Sheriff. It is now eight-thirty-five. All right, sir.

MR. WITTMANN:

May I proceed, Your Honor, while he is doing this?

THE COURT:

Yes, sir.

MR. WITTMANN:

In connection with the Court's judgment which has just been signed in this proceeding we hereby give formal notice for intention to file for writs of certiorari and mandamus to the Louisiana Supreme Court to the Court and to counsel for the State, who are here present represented in court. Because of the lateness of the hour and we haven't had time obviously to prepare written notice we give oral notice at this time of our intention to apply for writs of certiorari and mandamus. In connection with that application we would ask pending the application of those writs in the Louisiana Supreme Court on Monday morning.

THE COURT:

The motion is denied.

APPENDIX J

SUPREME COURT OF LOUISIANA

GULF STATES THEATRES OF LOUISIANA, INC. ET AL.

versus No. 54,044

OHN A. RICHARDSON and GEORGE W. D'ARTOIS

ON WRIT OF CERTIORARI TO THE FIRST UDICIAL DISTRICT COURT, PARISH OF CADDO, HONORABLE JAMES E. CLARK, JUDGE.

BARHAM, Justice.

The plaintiffs, Gulf States Theatres of Louisiana, nc., the owner of the Don Theatre in Shreveport, Lousiana, and a number of other motion pictures theatres, Jnited Artists Corporation, the owner of the movie film "Last Tango in Paris", and Joe Gianforte, Manager f Gulf States Theatres' Don Theatre brought suit gainst the District Attorney for the Parish of Caddo nd the Commissioner of Public Safety of the City of Shreveport, seeking to enjoin the defendants from enorcing R.S. 14:106 A (2) and (3). The plaintiffs commenced the showing of the nationally publicized and istributed motion picture, "Last Tango in Paris" in Shreveport on September 28, 1973. The first showing f said movie on that date was to a full capacity crowd. During the second showing of the motion picture on he same date, plaintiff Gianforte, was arrested and

charged with violation of R.S. 14:106 A (2). At the same time, pursuant to a search warrant issued by a judge of the First Judicial District Court for the Parish of Caddo, police authorities seized four twenty-six inch reels of film entitled "Last Tango in Paris".

The following day, after the first showing on that day of "Last Tango in Paris" from other reels of film, the plaintiff Gianforte, was again arrested and the reels of film which had produced on screen the movie "Last Tango in Paris" were seized. The copy of the film seized on September 29 was an exact copy of the film used on September 28. On that date, September 29, the plaintiffs sought relief from the United States District Court, Western District of Louisiana, Shreveport Division, and were granted a temporary restraining order prohibiting further arrest of Gianforte and further seizure of any film.

When the temporary restraining order issued by the federal district court expired, the plaintiffs filed this suit in the First Judicial District Court, Caddo Parish, seeking a temporary restraining order and a preliminary and permanent injunction, enjoining and restraining and prohibiting the District Attorney and the Commissioner of Public Safety or their representatives from interfering with the showing of "Last Tango in Paris" at the Don Theatre in Shreveport until there could be a final judicial determination of the obscenity issue in an adversary hearing. The district court on the same date, October 4, denied plaintiffs' petition for a temporary restraining order and injunctive relief.

Two criminal charges were then and are now pending in Caddo Parish against one the plaintiffs, Gianforte.

The plaintiffs then applied to this Court on that same date for relief under our supervisory jurisdiction. We granted writs of prohibition and mandamus to the district judge, ordering him to restrain and enjoin the defendants and their agents from making seizures of prints of the film "Last Tango in Paris", and from otherwise interfering with its showing at the Don Theatre in Shreveport, pending a judicial determination of the issues. Our docket No. 54,009, October 4, 1973, ____ So.2d ____. Upon the district court's receipt of that order from our Court on October 4, the restraining order was issued and a rule to show cause on the 9th day of October why a preliminary injunction should not be entered was served upon the defendants.

On October 5, the defendants answered and reconvened, praying for a permanent injunction against the plaintiffs from further showing and exhibiting the film "Last Tango in Paris", "in accordance with provisions of R.S. 13:4711, et seq." (nuisance statutes). The trial court issued a rule to show cause on the same date fixed for the other rule why this permanent injunction should not issue against the plaintiffs, defendants in reconvention, which would permanently enjoin them from further showing and exhibiting "Last Tango in Paris". The reconventional demand is accompanied by a certificate, signed by the District Attorney and the Commissioner of Public Safety, alleging on facts and allegations true and correct to the best of their

knowledge, information and belief, that the affiants viewed the motion picture complained of, believed it to be obscene, and that the showing of said movie constituted the continuous conducting of a public nuisance under the laws of Louisiana.

On October 9 trial was begun on the main and reconventional demands. At the conclusion of the trial on October 12, 1973, the demands of plaintiffs in rule for injunctive relief against the defendants were rejected. The court entered a judgment in favor of the plaintiffs in reconvention, the District Attorney, and the Commissioner of Public Safety, against the plaintiffs, defendants in reconvention, permanently enjoining the latter from showing "Last Tango in Paris", begining at 9:30 P.M. that day, October 12, 1973.

On October 16, the plaintiffs, defendants in reconvention, again applied to this Court under its supervisory jurisdiction and this Court granted a writ of certiorari, ordering the record of the proceedings below forwarded to this Court, and assigning the matter for hearing on October 26, our docket No. 54,044 (October 18, 1973), ____ So.2d ____. The order, which is on the usual certiorari form of this Court, further ordered all proceedings in the First Judicial District Court to be stayed and suspended.

On October 18, the plaintiff Gianforte, applied to this Court for review of certain preliminary rulings in the two criminal proceedings pending against him in the criminal section of the First Judicial District Court. This Court responded by order staying all proceedings

in the criminal actions pending a final action by this Court in the civil proceeding which is now before us, our docket No. 54,049 (October 18, 1973), ____ So.2d ____.

Posed for our consideration are two issues of constitutionality — that of R.S. 13:4711-4717 and that of R.S. 14:106. We will first address ourselves to the constitutionality of R.S. 13:4711-4717, since that issue will also be decided by this Court in the case on this same docket, State of Louisiana and the Parish of Caddo v. Gulf States Theatres of Louisiana, et al., No. 52,132, on remand from the United States Supreme Court. The case on remand is not only to be considered in light of Miller v. California, ____ U.S. ____, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and its companion cases, but also in light of Heller v. New York, ____ U.S. ____, 93 S.Ct. 2789, ____ L.Ed.2d ____ (1973), Roaden v. Kentucky, ____ U.S. ____, 93 S.Ct. 2796, ____ L.Ed.2d ____ (1973), and Alexander v. Virginia, ____ U.S. ____, 93 S.Ct. 2803, ____ L.Ed.2d ____ (1973).

The plaintiffs' position is that after the beginning of a financially successful showing of the motion picture "Last Tango in Paris", they were, and have remained (except for our stay order), permanently enjoined from showing any version of that motion picture. Plaintiffs allege that this motion picture has been playing in approximately 350 cities throughout the United States and has been viewed by approximately 5,000,000 people. Plaintiffs further allege that they were receiving revenue in excess of $1,000 per day from the showing of the film and therefore they have been,

and will be, under a permanent injunction, deprived of revenue in excess of $1,000 per day.

We are here concerned with the State's right to regulate obscene expression. Every exercise of the State's right to control obscenity "* * * implicates questions whether the procedures *** were adequate to avoid suppression of constitutionally protected publications. '*** [T]he line between expression unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn ***. The separation of legitimate from illegitimate speech calls for *** sensitive tools * * *'. Speiser v. Randall, 357, 357 US 513, 525 2 L. ed. 2d 1460, 1472 78 S. Ct. 1332. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961).

Keeping constantly in mind, then, that under consideration here is the delicate line of demarcation between unconditionally guaranteed freedom of speech and the very limited exceptions under which speech and expression may be legitimately regulated or suppressed, we examine the attacks upon the constitutionality of R.S. 13:4711-4717.

A history of the development of the statutes casts light upon the consideration of the constitutional attacks. The statutes originated with Act 47 of 1918, which

was an act to declare houses of prostitution and their contents nuisances and to provide means to enjoin and abate them. All seven provisions, R.S. 13:4711-4717, remained unchanged for over 40 years. In 1960 the Legislature attempted by Act 201 to amend Section 4711 to include *obscenity* with *prostitution* in the definition of a nuisance.

Chapter 32 of Title 13 of the Revised Statutes of 1950 is titled "Particular Classes of Actions and Cases". Part I is titled "Abatement of Public Nuisances". Subpart A, titled "Houses of Prostitution", contains these statutes which remained as originally enacted when the Revised Statutes of 1950 were adopted. They provide, as the title indicates, only a civil action for the abatement of the *nuisances of houses of prostitution.* Subpart B of Chapter 32, Part I, is a group of statutes designed to control and to abate the public nuisance of *gambling houses.* The control of prostitution, as indicated, originated in 1918. Two years later the control of gambling through abatement as a public nuisance was legislated. Disorderly houses (when properly defined), houses of prostitution, and gambling houses have always been subject to control, regulation, and suppression under the police power of the state. Moreover, the control of nuisances in general is usually governed in some part by *police regulations.* Analogous to the common law nuisance is our Civil Code Article 669, which states that insufferable inconveniences are regulated and governed by the custom of the place and the *"rules of the police".* At common law, nuisances per se include those activities which are forbidden by criminal law and sanctions.

Through development of a special civil action for the abatement of the nuisance of *prostitution*, our Legislature provided that houses of prostitution could be abated upon the petition of the district attorney or upon the petition and proper affidavit of interested parties. But the control of the act of prostitution is in no wise analogous to the control of obscenity. Although it may be possible to incorporate in some manner under the title "Abatement of Public Nuisances" the control of places where obscene expression is exhibited, published, or otherwise communicated, there is no corollary between control of the nuisance of prostitution and control of expressions which are subject to regulation only when they cross over that fine line into obscenity. A reading of R.S. 13:4711-4717 in light of their development and in light of their original purpose of controlling only the nuisance of *prostitution* makes apparent the reasons for the numerous attacks upon these statutes when they are used to control *obscenity*. The provisions must then be examined with careful consideration of the guarantees of freedom of expression afforded by the United States Constitution, Fourteenth and First Amendments, and Louisiana Constitution Article I, Section 3.

R.S. 13:4711 declares any place a nuisance where there exists prostitution or obscenity as defined by the criminal laws of the State. R.S. 13:4712 provides the procedure for an ex parte temporary injunction and for permanent injunction after hearing on a rule nisi to abate the nuisance perpetually. R.S. 13:4713 provides for contempt penalties for violation of any of these provisions relating to the injunction and for lien

upon, and seizure and sale of, the property where the nuisance was conducted for the fines imposed upon a finding of contempt. R.S. 13:4714 closes the place where the nuisance existed so that it cannot be used for any purpose for a period of up to one year. R.S. 13:4715 and 4716 provide for bond for release of property and disposition of fines and collection of fees. R.S. 13:4717 provides that judgment as to what constitutes a nuisance *"may be based on the general reputation so proven"*.

The statutes are attacked as being unconstitutional on their face for several reasons. The clear language of R.S. 13:4712 mandates that a temporary injunction "shall" be granted by the judge upon the simple allegation by the district attorney *upon information and belief* of the existence of obscenity without any requirement of a showing upon probable cause that obscenity is being published in same manner. When the district attorney presents the petition and his verified affidavit, the judge is required without the exercise of discretion to issue a temporary injunction. If one other than the district attorney or other parish official named in the statute brings the action, it is required only that a certificate be obtained from the judge that the applicant is acting in good faith and not for improper purposes. In either instance no adjudicative function at all is required. The statute calls only for a simple ministerial act by the judge. "Shall" is a command leaving no room for discretion. Naquin v. Iberia Parish School Board, 157 So. 2d 287 (La. App. 3rd Cir. 1963). As the appellate court succinctly stated: "* * * Rather than a judicial mind passing on the

relative merits of the petition, the judicial hand is forced by the Legislature to sign a temporary restraining order." State v. Gulf States Theatres of Louisiana, Inc., 255 So. 2d 857, 860 (La. App. 2nd Cir. 1971).

However, even if the literal wording of the statute, "shall", was construed as not requiring a simple ministerial act by the judge, this Court is still forced to find that there are no standards prescribing the *consideration for a judicial determination* of whether to issue or to refuse to issue the temporary restraining order. Is judicial determination for issuing the ex parte order made "from specific facts shown by veritifed petition or by supporting affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had"? C.C. P. Art. 3603. This is the ordinary basis for the issuance of a temporary restraining order. Certainly these Code of Civil Procedure requirements are not sufficient to satisfy the First Amendment requirements. If the court were considering whether a Fourth Amendment warrant for search and seizure was properly issued, it would examine the affidavit for facts to establish probable cause to review the basis for that judicial determination. However, there is no method whereby a requirement of probable cause for a criminal search warrant can be read into a civil statute for abatement of nuisance. So, if it is assumed arguendo that the judge is not mandated to act, but can make a judicial determination to issue or not to issue the ex parte injunction, the statute is nevertheless unconstitutional because no standards are set which govern

the judicial determination for the issuance of the ex parte injunction.

Although the State may regulate the dissemination of obscene expression, since obscenity is an exception to the constitutionally protected right of free speech, the State is required to observe stringent safeguards in the exercise of the right to prohibit. The very minimum constitutional standard required before there can be a suppression of an expression alleged to be obscene is an independent judicial finding of probable cause that the expression is obscene and therefore not constitutionally protected speech. Marcus v. Search Warrant, supra; A Quantity of Books v. Kansas, 318 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

In State v. Eros Cinema, Inc., 262 La. 706, 264 So.2d 615 (1972), we specifically and unanimously determined that there could be no seizure of an allegedly obscene expression without a prior judicial determination of an adequate factual basis for a probability that the expression constitutes obscenity. In that case, as in a number of cases decided by the United States Supreme Court which are cited there, we were considering a seizure under a search warrant for the purpose of criminal prosecution.

In Marcus v. Search Warrant, supra, the court, pretermitting the question of lack of hearing before seizure, held the seizure under the warrant unconstitutional, for the warrant gave total discretion to the exe-

cuting officers to make an on-the-scene determination of what constituted obscene publications. In Marcus, the court also condemned the issuing of warrants and the seizure of the allegedly obscene materials "* * * on the strength of the conclusory assertion of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene". That court concluded: "Mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression."

Under our statute, the simple verified affidavit of the district attorney on information and belief gives rise to an immediate order of suppression by injunction of alleged obscenity. This suppression is equally as effective as, and perhaps more onerous than, a seizure under search warrant. Moreover, the order for injunction acts as a mass suppression such as was condemned in Marcus. The order does not suppress only one copy of film; it suppresses all copies of the film. The statute on its face permits this suppression without any prior judicial determination, even ex parte, that the material to be suppressed is probably obscene in fact. The lack of standards for a judicial determination of probable cause is contrary to the numerous United States Supreme Court pronouncements that this is a minimal requirement for constitutionality of statutes providing for suppression of alleged obscenity before an adversary hearing. There is no provision in our statute requiring an independent judicial determination of the probability of obscenity before an ex parte order of suppression issues. While a statute not unconstitutional on its face may be unconstitutionally en-

forced, *a statute which is unconstitutional on its face cannot be constitutionally enforced.*

We are constrained to find that R.S. 13:4712 is unconstitutional on its face because it authorizes the total ex parte suppression of alleged obscenity without any independent judicial determination on facts that the expression is probably obscene.

We examine R.S. 13:4711-4717 for constitutionality to determine if these statutes provide for prior restraint without notice or trial. Alternatively, assuming that prior restraint can be had ex parte, we examine these statutes to determine if adequate safeguards for speedy judicial adversary hearing are provided.

We now address ourselves to a consideration of prior restraint in the context in which it is used in much of the current jurisprudence. The question is bifurcated: (1) Can there be prior restraint of future publication, circulation, or exhibition of an obscene expression in a *civil* proceeding without notice and hearing after the initial publication of that expression? (2) If so, what are the limitations and safeguards required for constitutionality of such restraint?

Times Film Corporation v. Chicago, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961) is often cited for the broad principle that prior restraint without notice and hearing may be had. The limited holding of Times Film Corporation is: "Petitioner's narrow attack upon the ordinance does not require that any consideration be

given to the validity of the standards set out therein. They are not challenged and are not before us." The court posed the one question it answered. "* * * whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide." The court, with four justices dissenting, held the ordinance not void on its face under such an attack.

In Bantam Books v. Sullivan, supra, the court said: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. * * * We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint. * * *"

Then, in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the limited question before the court in Times Film is reexpressed from Bantam Books to be "* * * 'whether a prior restraint was necessarily unconstitutional *under all circumstances*' ". (Emphasis from Bantam Books.) The argument in Freedman was that if it was accepted as law that the first showing of a film may be restrained under proper guidelines and judicial protection, the provision for censorship in a Maryland statute was an "invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression". It was there said: "Applying the settled rule of our cases, we hold that a *noncriminal* process which requires the prior submission of a film to a censor avoids constitu-

tional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. * * * Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. * * * The procedure must also assure a prompt final judicial decision, to minimize a deterrent effect of an interim and possibly erroneous denial of a license."

However, in A Quantity of Books v. Kansas, supra, a Kansas statute authorized the seizure of allegedly obscene books before an adversary determination of their obscenity and their destruction by burning or other means after that determination. Mr. Justice Brennan, author of that opinion, who also wrote the majority opinions in Marcus v. Search Warrant, Bantam Books v. Sullivan, and Freedman v. Maryland, cited those three cases, as well as Kingsley Books, and finally determined that the failure to afford an adversary hearing made the procedure leading to the order of seizure of all copies of seven specified novels unconstitutional.

Kingsley Books v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957) is a much misunderstood opinion. First, that case does not involve prior restraint without an adversary hearing although the language of the United States Supreme Court may lead one to believe such to be the case. There, a petition was filed by the chief legal officer of the City of New York to enjoin several defendants from distributing a series of allegedly obscene booklets. No restraint was sought

in that case except after an adversary hearing in response to the rule nisi, issued with the notice of the suit for injunctive relief, to show cause within four days why the defendants should not be enjoined pendente lite from distributing the books. The state court concisely held that "* * * when the court — *after an* adversary hearing — is able to read and examine the publications objected to, and acts judicially to enjoin their distribution, it is apparent that there is no 'previous restraint' in the genuine historical and constitutional sense of that term". Burke v. Kingsley Books, 142 N.Y.S.2d 735, 208 Misc. 150 (1955). The United States Supreme Court in Kingsley recognized that the adversary hearing under the rule to show cause was dispensed with because the "appellants consented to the granting of an injunction pendente lite and did not bring the matter to issue promptly, as was their right under subdivision 2 of the challenged section, which provides that the person sought to be enjoined 'shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial' ". The protection of the preliminary adversary hearing before even a temporary restraining order could issue, a requirement of joinder of issue for final determination within one day after issue was joined, and the requirement that judgment be rendered within two days were actually the basis for the holding in Kingsley that reasonable safeguards were afforded for protection of First Amendment rights in that statutory scheme for control of obscenity.

In State v. Eros Cinema, supra, this Court found that there was no way to preserve the best evidence in a criminal prosecution for exhibiting an obscene film except upon seizure of the film under search warrant. For this reason, we held that such a seizure is permissible in the *limited quantity necessary* where there are proper safeguards for establishing probable cause and for providing quick judicial determination on the merits, review, and final judgment. Our reason for believing this brief ex parte seizure, or, if you will, temporary suppression, was necessary in that criminal prosecution does not exist in this civil suit to abate a nuisance. We found there that in a criminal prosecution the Fifth Amendment right against self-incrimination would not permit a subpoena duces tecum. However, in a civil proceeding under the nuisance statute a subpoena duces tecum may be used to obtain materials desired as evidence in the proceeding. The compelling reasons for permitting a seizure for evidence under a constitutional warrant as provided in the Fourth Amendment, do not exist in a proceeding wherein suppression of the showing of the particular film alleged to be obscene and the closing of the theatre in which it is shown are sought.

A thorough consideration of these cases leads us to conclude that *in a civil proceeding to abate an obscene expression as a nuisance there can be no prior restraint without an adversary judicial adjudication.*

Where prior restraint is permitted by statutes in such a case as this, the statutes are unconstitutional because the safeguards which must follow as set forth in nu-

merous United States Supreme Court opinions are not provided in the statutes. In Marcus, Bantam Books, Freedman, A Quantity of Books, and Lee Art Theatre v. Virginia, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), the overriding holding is that there can not be, under a licensing statute, a statute for injunction or destruction, or a criminal prosecution, prior restraint without notice and hearing by seizure under search warrant or suppression by other method, *unless* immediate judicial determination in an adversary hearing is available, and a speedy final judicial determination of the issue is provided.

Under the statutes at hand, the first hearing on the question of the actual obscenity of the suppressed expression is by rule to show cause five days after the initial suppression. Since the form of suppression is injunction, under our law there can be no suspensive appeal from the trial court's ruling. C.C.P.Art. 3612. An appeal from a final injunction is subject to the same delays as other appeals. Because of these delays, in a case such as this, great injustice may result if the expression originally suppressed by temporary restraining order is finally found to be a constitutionally protected expression. In the instant case, we permitted plaintiffs to by-pass the Court of Appeal on application for exercise of the Court's supervisory jurisdiction in order to minimize the delay.

We said in Eros Cinema, supra, that we would require a hearing into the obscenity issue under seizure by search warrant within two days and a judgment at the trial court level 24 hours thereafter, and that

this Court would treat application for writs from an adverse ruling as remedial, thus assuring a speedy final determination of the issue. Here in this civil proceeding none of these protections are afforded, although the consequences which flow from the suppression may actually be graver and more onerous than those under our criminal statute. Even if prior restraint were permissible, the statute would be unconstitutional because it does not afford the safeguards for protection of First Amendment rights.

We have reserved for last consideration in this discussion of PRIOR RESTRAINT the most serious constitutional defect in the statutes. This consideration arises under the original and historical application of the doctrine of prior restraint.

Actually, prior restraint, in the context of its historical origin and as discussed in most early jurisprudence, is defined as that restraint or suppression of an expression without judicial determination of the right to suppress *before any publication, any exhibition, any communication of that expression.* The prohibition against prior restraint predates even our Bill of Rights. In 70 Columbia L.Rev. 1403, 1409, Blackstone's theory of the prohibition against previous restraint involving freedom of the press is discussed. Blackstone took the view that there could be no previous restraints upon publications, saying: "Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences

of his own termerity." The conclusion of the writer of that article is that Blackstone's distinction between prior restraints against publication and punishment subsequent to publication has survived and is applicable to the present legal doctrine. The question under this historical and very limited expression of the doctrine prohibiting prior restraint is whether an evidentiary hearing and judicial determination are required before an expression which is obscene can be *suppressed, prohibited, or restrained even before it is published, exhibited, or in any manner communicated. We are compelled to answer that, under this limited definition of prior restraint, suppression cannot be had without notice and a hearing.*

In Near v. Minnesota, 383 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), the court, in language broader than required by the issue presented to it, gave three examples of exceptions to the application of the doctrine, including attempts to control obscene publications. In Burstyn v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), the court appeared to remove the obscenity exception, and, finally, in Kingsley Books v. Brown, supra, the court correctly observed that the Near case had not concerned obscenity, and the exception of obscenity was discarded.

The doctrine of prohibiting prior restraint of expression without notice and hearing before the expression is ever published has more validity today than even in much earlier times when it was designed to prohibit the government from destroying printing presses so there could be no future publication. If these statutes

do in fact prohibit expression without notice and hearing even before the expression is communicated, published, or exhibited, they violate the constitutional right of free expression under the First Amendment and our Constitution, Article I, Section 3.

State ex rel. Liversey v. Judge Civil District Court, 34 La.Ann. 741 (1882), was a suit where plaintiff, under an allegation of previously published false, malicious, and libelous material, sought an injunction prohibiting the defendants from publishing in any future issue of the newspaper, which he alleged had libeled him, any defamatory material. The Court held that, because of the constitutional right to free speech, libel and slander were "* * * subjects of punitory, and not of merely preventive, remedies. The Constitution rules over all". The injunction was held to be an absolute nullity. The Court discussed the historical evolution of liberty of the press, and stated that to allow an injunction aimed at prohibiting further publication of defamatory material would permit the establishment of a complete censorship over the press so enjoined. Since our Court stated so clearly in that case that it cannot enjoin any future publication of defamatory remarks, certainly it must hold it cannot enjoin future publication of any and all expression. Defamatory and obscene speech are both limited exceptions to the First Amendment privilege.

We move to a consideration of the other provisions of these statutes. R.S. 13:4712, providing for the mandatory restraining order, the delayed evidentiary hearing, and the final permanent injunction, is buttressed

by *R.S. 13:4714*, which states in pertinent part that if the existence of a nuisance is established under this set of statutes, "an order of abatement shall be entered as a part of the judgment in the case, which order *shall direct the effectual closing of the building, structure, land or other place against its use FOR ANY PURPOSE for the period of ONE YEAR* * * *".

R.S. 13:4714 provides for contempt proceedings which may be brought ad infinitum, carrying fines up to $250.00 and imprisonment up to six months. The fines levied for contempt become liens upon the place which has been closed for all purposes.[1] Therefore, the combination of R.S. 13:4712, 4713 and 4714 places "prior restraint" as defined in its most limited sense and in its historical setting — i.e., restraint of expression before it is communicated the first time — upon any future publication, exhibition, or expression, whether obscene or not.

Gambling devices and the accoutrements of houses of prostitution, which may be and are controlled under the exercise of the police power, can be legally destroyed so as not to offend again. This, however, af-

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[1]Under this statute not only is the offensive, obscene material enjoined from exhibition, but none of the movable property or personal effects including equipment used to manufacture, exhibit, or distribute expression may be removed from the premises. And when the premises are closed, these effects along with the immovable closed become subject to the lien for contempt fines and subject to eventual seizure and sale to satisfy contempt judgments. This accomplishes a denial of the application of the doctrine of prohibiting previous restraint upon publication.

fords no basis for analogy with the suppression and regulation of speech and other means of expression.[2] In any regulation touching upon the areas of speech and other expression, there is a perfectly valid distinction between prior restraint and accountability after abuse. Louisiana Constitution, Article I, Section 3 reads: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; *any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.*" This is a clear and concise statement of our constitutional view that there can be no prior restraint of speech or other expression. One may speak, but when he exercises this privilege, he is accountable if there is an actual abuse of the privilege under one of the few exceptions to total freedom of expression.

R.S. 13:4714 does not permit mere book-burning or film destruction where there is an abuse of the First Amendment privilege. This provision has the effect of sledgehammering the printing press, the camera, the projectors, all the tools of expression in every medium, so that there can be no future expression at all

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[2]This particular constitutional defect, as well as others in the statutes we consider, probably results from the fact that the two situations were analogized. R.S. 13:4711-4717 originally abated the particular public nuisance of houses of prostitution. The amendment of R.S. 13:4711 in 1960 to include obscenity, an exception to the First Amendment right, simply treated obscenity as a nuisance. Defendants-Plaintiffs in reconvention — use a 1918 procedure providing only the minimal safeguards for abatement of houses of prostitution to close a First Amendment protected tool of communication, a motion picture theatre.

for one who transgresses by crossing the line from free speech to obscenity upon one occasion. We can envision no more fatal defect of prior restraint under its original definition in a statute which attempts to control obscenity than that which is found in R.S. 13:4717. That provision mandates the court to effectively close the avenue of any expression whether or not it abuses the privilege and before it is so determined.

In Kingsley Books v. Brown, supra, a New York statute was upheld by the United States Supreme Court because "* * * as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive". To the contrary, under our statute there can be no expression of any kind — good or bad — emanating either from the premises or from the devices on the premises for a period of one year. This is the very essence of the prior restraint condemned by Blackstone, by our Bill of Rights, and by our jurisprudence. Of all the constitutional violations on the face of these statutes, the prior restraint imposed under R.S. 13:4717 is the most offensive.

This particular section of the Revised Statutes does restrict expression not yet found to be an offense and not yet uttered. It is a classic example of prior restraint of speech and expression and is violative of federal and state constitutions.

Moreover, these statutes effect deprivation of property without due process in violation of our Constitu-

tion, Article 1, Section 2 and the Fourteenth Amendment to the United States Constitution. R.S. 13:4712 and 4714 in combination may close the premises where obscenity has been exhibited and deprive the owner of its use even if the use of his premises for exhibition of obscenity was not known and could not have been known by him. R.S. 13:4715 does not give him adequate relief from this deprivation of property. It merely provides that upon posting bond with surety *"in the full value of the property"* and upon certain guarantees he may release the property. The exchange of the full value for the thing is as much a deprivation of property without due process as if the premises were retained. Again, if another obscenity is exhibited, even entirely without the owner's knowledge, he must forfeit part of his bond each day of the exhibition. So, R.S. 13:4714, which is an exercise of unconstitutional prior restraint, also falls as a deprivation of property without due process of law.

It may be argued that since the statutory provision that the premises may be closed for use for any purpose for one year was not applied to the plaintiffs in the judgment of injunction, they cannot complain of the constitutionality of such a provision. The plaintiffs have standing to complain of R.S. 13:4714 for several reasons. First, Section 4714 provides that a judgment declaring an expression obscene and the premises a nuisance "may be based on the general reputation" of the premises or of the defendants or of the occupants or of habitual visitors thereto. Therefore, under the express provisions of Section 4717, it cannot be said that these defendants are not aggrieved by any judg-

ment which declares that the premises they occupy and the activities they engage in on those premises constitute a nuisance. According to R.S. 13:4717, the defendants may be adjudged guilty of operating a nuisance upon submission of the judgment in this case as proof of reputation. Certainly the judgment can, under Section 4717, constitute some evidence in the future. Therefore, the judgment has a chilling effect upon the defendants' right to make any expression, whether constitutionally protected or not, for fear of contempt penalties and further declaration of the premises as a nuisance.

Plaintiffs are entitled to attack the constitutionality of R.S. 14:4717. That provision is in absolute contravention of the principle of prior restraint upon expression and is also a deprivation of property without due process of law. It reads: "On the hearing in any action filed under the provisions of R.S. 13:4711 through 13:4717 evidence of the general reputation of the building, structure, land or other place or of the defendant or of the occupants thereof or habitual visitors thereto shall be admissible, *and judgment may be based on the general reputation so proven.*" Presumptions are provided for at law, and presumptions lie with one party or the other in certain civil proceedings. Burdens of proof shift according to the nature of the proceedings and the nature of the proof required in the proceeding. However, we can find no expression of law permitting a judgment to be based solely on the general reputation of the parties to the suit or of the things involved. Certainly no judgment affecting the right of free speech could be based on general reputation. Proof that a per-

son is repeatedly obscene in expression, that a press repeatedly has printed obscenities, or that a building has repeatedly housed obscenity is not proof susceptible of sustaining a judgment that another expression from one of these is itself an obscenity. One may be punished for uttering obscenities, one may be held in contempt for refusing to refrain from circulating that which is obscene, but one cannot be adjudged guilty of a new obscenity on reputation alone. R.S. 13:4717, which is part of the whole general statutory scheme for the action against these defendants, is unconstitutional.

We are of the opinion that R.S. 13:4711-13:4717 are unconstitutional insofar as they attempt to regulate obscenity.

The plaintiffs, defendants in reconvention, also attack these statutes and the injunction issued against them on the ground that R.S. 14:106 A(2) is unconstitutional. The argument is that obscenity referred to in the nuisance statutes is, by those statutes, defined by the "Criminal Laws of this State", (R.S. 14:106) and, therefore, if R.S. 14:106 A (2) is unconstitutional, the nuisance statutes are unconstitutional and the injunction issued against them is illegal, void and of no effect. We have considered the constitutionality of R.S. 14:106 A (2) and (3) in State v. Shreveport News Agency, Inc., No. 53,985 on this docket, ____ So.2d ____ (La. 1973), and State v. McNutt, No. 52,489, ____ So.2d ____ (La. 1973).

For the reasons assigned in State v. Shreveport News Agency, Inc., and State v. McNutt, plaintiffs' allegation of unconstitutionality here is supported and, pursuant to the clear pronouncement by the United States Supreme Court, we have declared R.S. 14:106 (2) and (3) to be unconstitutional. For that reason and other reasons herein presented, we hereby declare R.S. 13:4711-4717 unconstitutional, insofar as they attempt to declare obscenity a public nuisance. The permanent injunction against the plaintiffs, defendants in reconvention, entered by the trial court, is dissolved, vacated and set aside.

It is further ordered, adjudged and decreed that the defendants, John A. Richardson, District Attorney, and George W. D'Artois, the Commissioner of Public Safety for the City of Shreveport, their agents, employees and representatives, are permanently enjoined and prohibited from interfering with the showing of "Last Tango in Paris". Defendants are to pay all costs of the proceedings.

Sanders, C. J., dissents with written reasons.

Summers, J., dissents and will assign reasons.

Marcus, J., dissents with written reasons.

Calogero, J., subscribes to the foregoing opinion and assigns additionally his concurring reasons in State v. Shreveport News Agency, Inc. . . .

SUPREME COURT OF LOUISIANA

GULF STATES THEATRES OF LOUISIANA, INC., ET AL.

versus No. 54,044

JOHN A. RICHARDSON and GEORGE W. D'ARTOIS

SANDERS, Chief Justice (dissenting).

Last year, in State v. Gulf States Theatres of Louisiana, Inc., 264 La. 44, 270 So.2d 527 (1972), this Court interpreted LSA-R.S. 13:4712, the abatement of nuisance statute, and upheld its constitutionality. The case was thoroughly considered on two occasions, the opinions being authored by Chief Justice McCaleb and Mr. Justice Summers.

Answering the constitutional arguments presented, this Court stated:

> "The principal thrust of the attack upon the constitutionality of the act is aimed at the quoted provision declaring that the 'the judge . . . shall grant a temporary injunction.' It is contended that there is no requirement that probable cause be shown through factual allegations in the affidavit accompanying the petition; that is, the mandate that the judge 'shall' grant the temporary injunction deprives the judge of any discretion in the matter; the im-

plication being that the judge must issue the temporary injunction whether the nuisance exists or not. For this reason, it is asserted, the First Amendment right of freedom of expression enjoyed by makers and exhibitors of motion pictures is restrained without reasonable cause.

"This argument lacks merit. The statute requires that the petition allege the existence of a 'nuisance' and that it be verified by the district attorney. This makes it necessary for the trial judge to determine, on the basis of the facts alleged, whether 'obscenity', as defined by Article 106 of the Criminal Code, is 'carried on' before he issues an injunction. If the allegations and the accompanying affidavit do not, in the judge's opinion, recite facts which warrant a conclusion that a 'nuisance' is being 'carried on' then the prerequisites to the issuance of the injunction have not been satisfied and the judge must not sign the temporary injunction. On the other hand, if the allegations of the petition and the accompanying affidavit do set forth, in the judge's opinion, that a 'nuisance' is being carried on, then, and in that event, he 'shall' issue the temporary injunction.

"Under this view a great deal of discretion is left to the trial judge for a judgment on his part must be made. He must ascertain from the petition and accompanying affidavit whether the facts set out fulfill those elements

of the law which, taken together, constitute a nuisance. For instance, in this case, the petition must allege that the film must have been, and is being, exhibited with intent to primarily appeal to the prurient interest of the average person. And it must be lewd, lascivious, filthy or sexually indecent.

. . .

"The word 'shall' as used in this statute is nothing more than the mandate the law imposes upon the judge to issue an order, as in other cases, when the rights of the parties are supported by the law and properly alleged facts; e.g., 'An injunction *shall* issue ....' La. Code Civil P. art. 3601; 'A temporary restraining order *shall* be granted without notice when it clearly appears from specific facts shown by a verified petition or by supporting affidavit ....'

"Any restriction imposed in advance of a final judicial determination on the merits of obscenity must be limited by the shortest fixed period compatible with sound judicial resolution and the proceedings must be assured of a prompt final judicial decision. A period of fourteen days would not be too long within which to commence such proceedings. United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971)."

Today, reinterpreting the same statute in a manner adverse to its constitutionality, the majority holds it unconstitutional. I disagree.

The central error, in my opinion, is that the reinterpretation itself shoves the statute off the constitutional cliff. The decision violates the cardinal principle, that, when it can reasonably do so, the Court should interpret a statute in a manner that will preserve its constitutionality. When a statute is susceptible of two interpretations, one rendering it unconstitutional and the other constitutional, the Court is under a duty to adopt the one sustaining constitutionality. Pearce, ex rel. Structural Pest Con. Com'n v. Sharbino, 254 La. 143, 223 So.2d 126 (1969); State v. Smith, 252 La. 636, 212 So.2d 410 (1968); State v. Gatlin, 241 La. 321, 129 So.2d 4 (1961); 16 Am.Jur.2nd, Constitutional Law, §144, p. 354.

In Pearce ex rel. Structural Pest Con. Com'n v. Sharbino, supra, this Court stated:

> "To determine whether the present statute is unconstitutional, we must examine its provisions in the light of well established constitutional principles. Among them are salutary rules of judicial restraint. When a court can reasonably do so, it will construe a statute so as to preserve its constitutionality. Buras v. Orleans Parish Democratic Executive Committee, 248 La. 203, 177 So.2d 576; Bauman v. Ross, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270; United States v. Harriss, 347 U.S. 612, 74 S.Ct.

808, 98 L.Ed. 989; 16 Am.Jur.2d, Constitutional Law, § 144, p. 345. Moreover, when a statute is susceptible of two interpretations, one making it unconstitutional and the other constitutional, the interpretation sustaining constitutionality should be adopted. Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655, 67 A.L.R. 1183."

The original interpretation of the statute by this Court, in my opinion, was sound. I would adhere to it and uphold the statute.

I also dissent from the holding that LSA-R.S. 14:106, the criminal obscenity statute, is unconstitutional for the reasons assigned by me in State of Louisiana v. Shreveport News Agency, Inc., No. 53,985 handed down today.

For the reasons assigned, I respectfully dissent.

SUPREME COURT OF LOUISIANA

GULF STATES THEATRES OF LOUISIANA, INC., et al

versus No. 54,044

JOHN A. RICHARDSON and GEORGE W. D'ARTOIS

MARCUS, Justice (dissenting)

I dissent. I do not agree with the majority that R.S. 13:4711-13:4717 are unconstitutional insofar as they at-

tempt to regulate obscenity. My reason for this conclusion is ably set forth in the majority opinion in State of Louisiana v. Gulf States Theatres of Louisiana, Inc., 270 So.2d 547 (La. 1972), wherein the constitutionality of these statutes was upheld. I further find that R.S. 14:106 A(2) is constitutional for the reasons assigned in my dissenting opinion in State of Louisiana v. Shreveport News Agency, Inc., No. 53,985 on the docket of this Court handed down this date.

SUPREME COURT OF LOUISIANA

GULF STATES THEATRES OF LOUISIANA, INC. *et al.*

versus No. 54,04

JOHN A. RICHARDSON and GEORGE W. D'ARTOI

Concurring Opinion

TATE, Justice.

The issue is legal, not rhetorical.

It is true that in State v. Gulf States Theatres, 26 La. 44, 270 So.2d 547 (1972), a majority of this cour held our nuisance-abatement statute, La.R.S.13:471 not unconstitutional when applied to a suppression o First Amendment rights.[1] However, the United State

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[1]Not only the three dissenting judges of this court, but also a five judges of the state Second Circuit found the statute to b unconstitutional when so applied. 255 So.2d 867 (1971).

Supreme Court granted certiorari and *vacated* our decision and ordered us to reconsider it in the light of several of its decisions.[2] ____ U.S. ____, 93 S.Ct. 3063 (1973).

Therefore, what we did on our first opinion does not quite possess the persuasiveness my dissenting brethren find in it. It is thus not only the present majority which reverses its previous ruling; such previous ruling was *annulled* by the United States Supreme Court itself.

One of the decisions to which that tribunal referred this court for our reconsideration was Paris Adult Theatre v. Slayton, ____ U.S. ____, 93 S.Ct. 2628 (1973). There, our high court upheld a Georgia statute permitting injunctive relief against the showing of obscene movies. However, in so doing, the Supreme Court specifically noted, 93 S.Ct. 2634:

"Here, Georgia imposed no restraining on the exhibition of the films involved in this case *until after a full adversary proceeding* and *a final judicial determination* by the Georgia Supreme Court that the materials were constitutionally unprotected. *Thus the standards of* [four United States Supreme Court cases cited] *were met.*" (Italics mine.)

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[2]This we did in an opinion on the remand in the case, Docket No. 52,132, rendered on the same date as the present majority opinion; only two justices dissented from following the clear implication of the high court's remand.

To the contrary, the statute we *here* hold unconstitutional permits the ex parte closing of a movie theater. It also permits its being kept closed during the many months of appellate review during which the application or not of the First Amendment is being decided. It further permits the closing of the theatre for a year, the destruction of the printing press so to speak, if the exhibitor guesses wrong as to the application of the First Amendment. It thus violates almost every one of the standards imposed by our constitution (as interpreted both years ago and today by our Supreme Court) before prior restraint will be allowed of expression arguably protected by the First Amendment.

This is not a time for speech-making and appeal to the emotions and to the abhorrence of all of us for hard-core pornography. It is a time for calm, considered attempt by legal reasoning to apply a clear ruling of the United States Supreme Court, which annulled a previous decision of this court, to the statute in question. For some of us to ignore the Supreme Court's annulment and its clear pronouncements, in a bland adherence to the former decision of this court now annulled by the high court, does not seem to me to comport with accepted principles of legal reasoning, judicial function, and adherence to law and order by following not only rulings with which one agrees but also rulings with which one disagrees.

SUPREME COURT OF LOUISIANA

GULF STATES THEATRES OF LOUISIANA, INC., ET AL

versus No. 54,044

JOHN A. RICHARDSON and GEORGE W. D'ARTOIS

SUMMERS, Justice (dissenting).

I adhere to the reasons assigned for our decision on this identical issue in State of Louisiana v. Gulf States Theatres of Louisiana, Inc., 270 So. 2d 547 (La. 1972), where the constitutionality of La. R.S. 13:4711-17 was upheld. My reasons for dissent in State v. Shreveport News Agency, Inc., No. 53,985, rendered December 3, 1973, are applicable to the declaration that Article 106 of the Criminal Code is unconstitutional.

APPENDIX K

SUPREME COURT OF LOUISIANA

GULF STATES THEATRES OF LOUISIANA, INC. ET AL

versus No. 54,044

JOHN A. RICHARDSON and GEORGE W. D'ARTOIS

ORDER FOR STAY AND RECALL OF JUDGMENT

On consideration of the Petition, Motion and Application of John A. Richardson and George W. D'Artois in the above numbered and entitled cause:

IT IS ORDERED that the execution and enforcement of the Judgment and Decree rendered in the above entitled and numbered cause be, and it is hereby stayed, and arrested pending and until the 11 day of April, 1974, in order to permit John A. Richardson and George W. D'Artois to seek a Writ of Certiorari from the United States Supreme Court and, in the event that John A. Richardson and George W. D'Artois shall timely apply to said Court for Writs of Certiorari or review, then it is ordered that the execution and mandate, and enforcement of the Judgment and Decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed and arrested until the Supreme Court of the United States shall have made its final disposition of this case.

New Orleans, Louisiana, this 14 day of January, 1974.

/s/ JOE W. SANDERS
CHIEF JUSTICE, SUPREME
COURT OF LOUISIANA

APPENDIX L

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

GULF STATES THEATRES OF LOUISIANA, INC., UNITED ARTISTS CORPORATION, AND JOE GIANFORTE

versus No. 54,044

JOHN A. RICHARDSON AND GEORGE W. D'ARTOIS

January 31, 1974

In Re: Application for Recall of Stay Order, or Alternatively for Clarification

Application partially granted: The stay order previously issued pursuant to 28 USC 2101 (f) is amended so as not to continue it beyond February 15, 1974 (in order to permit the opponents to secure a further stay order, if issued, from a justice of the United States Supreme Court, see 28 USC 2101 (f)). As to the application to release a copy of the film, no showing has been made that remedies have been exhausted in the district court and no reviewable minutes are attached to the application.

/s/ AT JR
/s/ PFC
/s/ WFM

SANDERS, C.J., dissents from the amendment of stay order.

SUMMERS, J., dissents and will assign reasons.

BARHAM, J., concurs in order that the matter may be resolved. However, I subscribe fully to the reasons assigned by Justice Dixon in dissent.

DIXON, J., dissents from the denial of the motion to recall the stay order. It is only when the *applicant* for the stay can show that they are aggrieved by the violation of a right under the U.S. Constitution that a stay order under 28 USC 2101 (f) is appropriate. Sklaroff v. Stevens, 120 A 2d 694. We have declared a statute of this state unconstitutional and the judgment has become final. The state has pointed to no case in which the *state* has been granted a stay in such a case, and we should not extend the time during which, we have already held, the defendant is being deprived of its rights under the U.S. and Louisiana Constitutions.

A TRUE COPY
Supreme Court of Louisiana
New Orleans
January 31, 1974
/s/ PHIL TRICE
Deputy Clerk

SUPREME COURT OF LOUISIANA

GULF STATES THEATRES OF LOUISIANA, INC., UNITED ARTISTS CORPORATION, AND JOE GRANFORTE

versus No. 54,044

JOHN A. RICHARDSON AND GEORGE W. D'ARTOIS

SUMMERS, Justice (Dissenting)

In the exercise of a wise discretion, in keeping with the invariable practice of this Court, and acting under the authority of the Act of Congress authorizing the action[1], the Chief Justice granted an order staying the finality of the judgment and decree in this matter. The stay was granted to permit the "parties aggrieved" to apply to the United States Supreme Court for review of the "substantial federal question" involved.

The action was entirely proper. It was discreet to grant the aggrieved parties an opportunity to obtain review of this Court's judgment striking down the obscenity laws of this state. To do so grants the parties aggrieved the time necessary to prepare and file the necessary application in the United States Supreme Court and obtain consideration of the application.

No one denies that this case involves a "substantial federal question" and the Chief Justice of this Court

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[1]28 U.S.C.A. 2202.

has routinely granted applications for stay in such cases. We have always considered such a stay in the same light as a right of appeal which is favored in the law. It would seem, also, that the majority which set aside the ninety day stay would have anxiously approved this exercise of discretion by the Chief Justice. Aside from the applicant's undoubted right to the stay, the ninety day delay could have provided the time needed for the legislature to enact remedial legislation on a subject of such widespread public interest and concern.

I know of no instance in this Court's practice where the stay has been denied in such a case. To the contrary, under the long-established practice stays have been routinely granted by the Chief Justices in the past when properly applied for as in this case.

The law on the subject is clear. The Act of Congress provides in part:

> "(f) If any case in which the final judgment or decree of any Court is subject to review by the Supreme Court on Writ of Certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a Writ of Certiorari from the Supreme Court. The stay may be granted by a judge of the Court rendering the judgment or decree or by a Justice of the Supreme Court ...." 28 U.S.C.A. 2101(b).

While neither controlling nor fully measuring the Court's discretion, the following indicates the character of cases which will be considered by the United States Supreme Court on certiorari: "Where a state court has decided a federal question of substance not theretofore determined by this Court (U.S. Supreme Court), or has decided it in a way probably not in accord with applicable decision of this Court (U.S. Supreme Court)." (parenthesis added). Rule 19 (1)(A), Rules of the Supreme Court of the United States.

Reducing the time to apply to the United States Supreme Court from ninety to thirty days effectively denies the right. It will be impracticable in the brief fifteen days allowed after this turnabout to prepare and file the application in the United States Supreme Court and to also obtain a consideration of and action on the application there. Thirty days is not the "reasonable time" the statute allows under the circumstances of this case. Rule 22(1), Rules of the Supreme Court of the United States.

As I understand, the action of the majority is based upon two theories: First, that the issue involves sensitive First Amendment rights and the ninety day delay will bring about a chilling effect upon those rights; and, second, the stay of finality is not available to the State for the State is not a "party aggrieved" as contemplated by the Act of Congress. Neither of these theories is a proper basis for this Court's action.

The right to disseminate obscenity in public is not protected by the First Amendment. This Court has nev-

er reversed the trial judge's finding that the film is obscene. Until the court reverses the trial court finding, these defendants should be entitled to act upon the premise that the film is obscene and that First Amendment rights are not involved.

The applicants for the stay were the District Attorney of the First Judicial District Court and the Commissioner of Public Safety of the City of Shreveport acting on behalf of the State and City. Whether considered as representatives of the State, or in their individual official capacities, they are parties aggrieved. I find that the United States Supreme Court has held that the state is a "party aggrieved" by a decree of the United States Civil Service Commission ordering suspension of a member of the State Highway Commission. State of Oklahoma v. U.S. Civil Service Commission, 330 U.S. 127 (1946). This authoritative decision illustrates the accepted usage of the words "party aggrieved" and the recognition by the United States Supreme Court of that meaning. Cf. City of Bessemer v. Eidge, 162 Ala. 201, 50 So. 270 (1909); Pacific Power Co. v. State, 31 Cal. App. 719, 162 P. 641 (1916); Jersey City v. Jersey City Water Supply Co., 90 N.J.Eq. 105 A. 494 (1918); Kentucky State Racing Commission v. Fuller, 481 S.W.2d 298 (Ky. 1972); In re Stoian's Estate, 138 Mont. 384, 357 P.2d 41 (1960); Munro v. Alcoholic Beverage Control Appeals Board, 50 C.2d 863, 326 P.2d 506 (1958); Koehn v. State Board of Equalization, 50 C.2d 432, 326 P.2d 502 (1958); In re McDonald, 153 A.2d 651 (D.C. Mun. App. 1959). The party cast in a litigation is undoubtedly a "party aggrieved" by

the adjudication, and the state should not be denied rights granted to other parties aggrieved.

The action of the majority refuses to recognize this modification of the stay order to be an effective denial of the right to review by the United States Supreme Court of a matter of widespread public interest. The action of the majority is a departure from the long-established practice of this Court. It is a refusal of the majority to recognize the obvious and authorative meaning of "party aggrieved".

I respectfully dissent.

APPENDIX M

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 53,985

SHREVEPORT NEWS AGENCY, INC.

ON WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO THE FIRST JUDICIAL DISTRICT COURT, PARISH OF CADDO, HONORABLE JOHN F. FANT, JUDGE.

BARHAM, Justice.

The State filed 20 bills of information, each charging the defendant with a violation of the Louisiana obscenity statute, R.S 14:106 A (2) and (3). The State had seized twenty magazines and the seizure of each magazine constitutes the offense in the twenty separate bills of information. The defendant filed a motion to quash and a supplemental motion to quash, alleging in part that the bills of information were filed under statutory provisions which are unconstitutional and which deprive defendant of its constitutional rights under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Defendant alleges that the statute is so vague and indefinite that it must fall since it does not give notice of the criminal activity intended to be proscribed. The defendant further contends that recent decisions of the United States Supreme Court have made the statute unconstitutional on its face for lack of specificity.

The defendant here is charged in each bill of information with violating R.S. 14:106 A (3) by intentionally possessing, with intent to sell, exhibit, give, and advertise, a magazine which is obscene as defined by R.S. 14:106 A (2). R.S. 14:106 A (2) and reads as follows:

"Obscenity is the intentional:

* * * *

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper * * *.[1]

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person."

In 1957 in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, the United States Supreme Court held that obscenity is not within the area of constitutionally protected speech or press. Additionally, although Roth dealt with obscenity in the abstract, certain safeguards or standards were required of local

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[1]As amended by Act 199 of 1960.

statutes for the judging of obscenity in order that the statutory regulation not impinge upon First Amendment rights.

First, the Court differentiated between sex and obscenity and declared that sexual material which could be declared obscene was material whose *dominant theme taken as a whole appeals to prurient interests.* Roth further discarded the concept of the impact of the material upon particularly susceptible persons and looked rather to the *effect of the material upon the average person applying contemporary community standards.*

The Louisiana Legislature, apparently reacting to the Roth decision, amended R.S. 14:106 (2) to read as above quoted, in 1960. In State v. Roufa, 241 La. 474, 129 So.2d 743 (1961) this Court held the particular section of the statute we consider to be constitutional, relying upon Roth v. United States. In Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964), the court transformed Roth's statement that *obscenity* is "utterly without redeeming social importance" into a third safeguard. The court stated:

> "Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, *for a work cannot be proscribed unless it is 'utterly' without social importance.*" (Emphasis here and elsewhere supplied).

See also Kingsley International Pictures Corporation v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959).

Nine years after Roth, the Supreme Court reiterated the third safeguard for testing the constitutionality of a local statute regulating obscenity in A Book Named: "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), (hereinafter referred to as "Memoirs"). There the court below had held under the "social importance test" of Jacobellis that the material which appeals to prurient interests and is patently offensive need not be "unqualifiedly worthless before it can be deemed obscene". In Memoirs, the Supreme Court stated, "* * *A book cannot be proscribed unless it is found to be *'utterly' without redeeming social value*. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive."

In State v. Henry, 250 La. 682, 198 So.2d 889 (1967),[2] our Court considered the constitutionality of R.S. 14:106 (2) again. The Court noted that the legislature had adopted the two safeguards required under the Roth decision. It did not meet the question of whether

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[2]Reversed by the United States Supreme Court in per curiam, "The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is granted and the judgment is reversed. Redrup v. New York, 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414." Henry v. Louisiana, 392 U.S. 655, 88 S.Ct. 2274, 20 L.Ed.2d 1343.

or not the statute met the third standard required under Jacobellis and Memoirs. However, the court did cite the companion cases to Memoirs, Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), and Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966), but for the holding that obscenity can be restricted and controlled without violating the First Amendment.

In State v. Gay Times, Inc., 274 So.2d 162 (La. 1973), the majority of this Court stated, in light of Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967), and the varying views of the several Justices of the United States Supreme Court in other opinions: "* * *Consequently, there is no easily ascertainable standard by which we may judge the constitutionality of the Louisiana obscenity statute as applied to moving picture film." The Court then held: "*Under the Roth standards*, we find the second section of R.S. 14:106 to be violative of neither the First and Fourteenth Amendments to the United States Constitution nor Art. I, § 10 of the Louisiana Constituion of 1921."

At the time of the trial court's rulings on this defendant's motions it could be stated unequivocally that *Louisiana's highest court* had interpreted and applied the obscenity statute to prohibit the sale of *all* "lewd, lascivious, filthy and sexually indecent" expression within the ambit of the Roth safeguards. A perusal of the evolution of the obscenity statute makes it clear that *our legislature* intended to prohibit the display and distribution of *all* "lewd, lascivious, filthy or sexually indecent" matter or materials which could con-

stitutionally be prohibited. When the trial court ruled upon the defendant's motions to quash on the grounds of unconstitutionality, it was correct under the interpretation and application of that statute by the highest court of this state. However, the United States Supreme Court handed down five cases concerning obscenity statutes during its last term. We must decide the constitutionality of our statute under the latest pronouncement by the United States Supreme Court. The principal case which affects our decision is Miller v. California, ____ U.S. ____, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).[3]

Before the Miller decision, material which was "lewd, lascivious, filthy or sexually indecent" was obscenity and without Firt Amendment protection, if it were established that:

(A) The dominant theme of the material taken as a whole appealed to the prurient interest in sex;

(B) The material was patently offensive because it offended contemporary community standards relating to the description or representation of sexual matters;

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[3]See also: Paris Adult Theatre I v. Slaton, ____ U.S. ____, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); U.S. v. Orito, ____ U.S. ____, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); Kaplan v. California, ____ U.S. ____, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); U.S. v. 12 200 Ft. Reels of Super 8mm. Film, et al., ____ U.S. ____, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

(C) The material was utterly without redeeming social value.

Miller v. California reviewed a California statute which had been interpreted under the Memoirs test in the very same light as the criteria above enumerated. Chief Justice Burger, writing for the majority, stated that the case they reviewed was tried in the lower court on the theory that the statute incorprorated the three-pronged Memoirs test. He wrote:

> "• • • But now the 'Memoirs' test has been abandoned as unworkable by its author and no member of the Court today supports the 'Memoirs' formulation."

The United States Supreme Court repudiated the Memoirs test which had been incorporated in part into our law by statute and to some extent by court interpretation. In repudiating the Memoirs test, the court stated that one part of the test:

> "• • • called on the prosecution to prove a negative, i.e., that the material was '*utterly* without redeeming social value' — a burden virtually impossible to discharge under our criminal standards of proof."

The majority further found that the Roth and Memoirs test had never been approved by a majority of the court. As the United States Supreme Court in Miller

laid down new tests for determining obscene material which could statutorily be controlled, it said:

"* * *

"We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. *State statutes designed to regulate obscene materials must be carefully limited.* See Interstate Circuit, Inc. v. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.*"

The court then laid down the constitutional test for local control of obscenity by statute. It said:

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *, (b) whether the work depicts or describes in a patently offensive way, sexual conduct *specifically defined by the applicable state law*, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The court further:

> "If a state law that regulates obscene material is thus limited, as written or construed * * *.
>
> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete *legislative efforts.*"
>
> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials *unless these materials depict or describe patently offensive 'hard-core' sexual conduct specifically defined by the regulating state law, as written or construed.* We are satisfied that these *specific prerequisites* will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

The above is an accurate summary of the totality of the guidelines laid down in Miller v. California for testing the constitutionality of a statute. The court additionally gave to the state legislatures examples of what activity or matter could be declared obscene, if done so with specificity.

The remainder of the opinion deals with the test of "community standards" which has no application to the issue before us.

Thus, it must be obvious, even to laymen and surely to this Court, that R.S. 14:106(2) does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.

We are urged by the State, however, to take the two examples, which the Miller majority opinion suggest state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. This urging comes because of a statment in Footnote 6 of the Miller opinion:

> "* * * Other existing state statutes, as construed heretofore or hereafter, may well be adequate."

But the body of the opinion, where the examples are given, states emphatically that it is not a function of that court, and certainly we hold that it is not a function of our Court, to propose new regulatory schemes. The court stated:

> *"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts.* It is possible, however, to give a few plain examples of *what a state statute* could define for regulation under the second part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbations, excretory fuctions, and lewd exhibition of the genitals."

In United States v. 12 200 Ft. Reels of Super 8 mm. Film, et al., ____ U.S. ____, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), the Chief Justice, who authored all five of the opinions, stated in Footnote 7, in pure obiter dicdictum, that the Supreme Court was prepared to construe "obscene", "lewd", "lascivious", "filthy", "indecent", or "immoral", for the purpose of reviewing the constitutionality of the federal statutes, 19 U.S.C. § 1305 (a) and 18 U.S.C. § 1462, as being limited to "specific — hard-core" sexual conduct given as examples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. Our Court may interpret a statute, but it cannot re-write a statute in order to hold it constitutional. The Louisiana Legislature intended to regulate all material which could constitutionally be declared obscene. Certainly, the legislature intended to prohibit more than the two examples given in the Miller opinion.

Our Court has, in a long line of cases, held that we must strictly consider all criminal and penal statutes as stricti juris, resolving ambiguities in favor of the accused. State v. Christine, 239 L.a 259, and cases cited therein at page 290, 118 So.2d 403, 414 (1960). The Court said there that our courts have "* * *consistently*

refused to usurp the prerogatives of the legislature by supplying either the definition or essential elements thereof that have been omitted in the drafting of the statute * *."*

Recently, in State v. Brown, 282 So.2d 707 (La. 1973), Mr. Justice Marcus, writing for the majority, cited State v. Ganch, 263 La. 251, 268 So.2d 214 (1972), and State v. Adams, 263 La. 286, 268 So.2d 228 (1972), per curiam opinions of this Court which had declared unconstitutional R.S. 14:103 A (7) and R.S. 14:103 A (2). Mr. Justice Marcus therein declared R.S. 14:103 B (2)(e) unconstitutional and quoted approvingly from the per curiam in Ganch and from a recent opinion of the United States Supreme Court:

> "The statute on its face is susceptible of application to expression protected by the Louisiana Constitution (Art. 1, Sec. 3) and the First Amendment of the U.S. Constitution. *Since we have not heretofore limited the statute in application to expression which is not constitutionally protected, it must fall as being overly broad and in contravention of the Louisiana and United States Constitutions.*
>
> "The United States Supreme Court in Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972), stated:
>
> "The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly lim-

ited classes of speech.' Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942). * * * In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression, * * *"

The United States Supreme Court in Miller v. California has made R.S. 14:106 (2) unconstitutional. It has required the state to draft a statute with specificity because "* * *these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution * * *" Our statute is totally lacking in specificity which would comply with the requirements of Miller v. California. Mr. Justice Dixon, who wrote the majority opinion in State v. Gay Times, Inc., supra.[4] joins with the rest of the majority here in the opinion that we are now required, under Miller, to overrule the holding in that opinion. We reject any theory that we can authoritatively construe our criminal statute regulating obscenity so as to make it constitutional under The United States Supreme Court holding in Miller v. California. It is for the legislature to design a statute or statutes which meet the tests and formulations set forth by that court.

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[4]On November 5, 1973, the United States Supreme Court, in Gay Times, Inc. v. Louisiana, No. 73-4 on its docket, vacated our judgment in State v. Gay Times, Inc., 274 So.2d 162 (La. 1973), and remanded the case for reconsideration in light of Miller v. California, and others.

In summary, we conclude that R.S 14:106(2), as considered and interpreted in light of Miller v. California, is over-broad, too general, and without the required specificity to withstand the constitutional attack under the United States Constitution, First and Fourteenth Amendments, and our Constitution Article 1, Sections 2 and 3. We conclude that while the United States Supreme Court has given examples of what it believes may be controlled as obscenity without violating the First Amendment right of free speech, it would be an unconstitutional usurpation of the legislative function for us to engraft these limiting two examples into a broad, general statute which clearly conveys the obvious legislative intention to prohibit many other "Offensive representations or descriptions".

The United States Supreme Court pronouncement in Miller v. California has made our statue unconstitutional. It is the legislative function to cure the defects in the statute in the manner and to the extent which they believe the people of this state desire within the constitutional limits now newly pronounced by the United States Supreme Court.

Pursuant to the clear pronouncement by the United States Supreme Court, we declare R.S. 14:106 A (2) and (3) to be unconstitutional. The trial court judgment is reversed. The motions to quash are sustained. The defendant is ordered discharged.

Sanders, C. J., dissents with written reasons.

Summers, J., dissents and will assign reasons.

Marcus, J., dissents with written reasons.

Calogero, J., additionally assigns concurring reasons.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 53,985

SHREVEPORT NEWS AGENCY,INC.

* * * *

Concurring Opinion

Filed: Dec. 5, 1973

TATE, Justice.

The majority opinion needs no defense. Nevertheless, the intemperate pronouncements in at least one of the dissenting opinions oblige me to note that oversimplification of a complex legal issue and an appeal to emotion do not serve the interests of the legal order, the judicial process, or true respect for law and order.

The issue before us arises because of the decisions of the United States Supreme Court in Miller v. California, ____ U.S. ____, 93 S.Ct. 2607 (1973) and a series of related decisions. One of these *annulled* a previous decision of *this* court which had upheld a determination that a motion picture was obscene and enjoined its exhibition. Gulf States Theaters of Louisiana v. Louisiana, ____ U.S. ____, 93 S.Ct. 3063 (1973). There, the high court of the nation remanded the case and ordered

us to reconsider our previous determination in the light of *Miller* and other decisions cited.

Ten months ago we had *previously* authoritatively construed our obscenity statute as constitutional under pre-*Miller* standards. State v. Gay Times, Inc., 74 So.2d 162 (La. 1973). There, we had authoritatively construed our obscenity statute in the light of pre-*Miller* standards and had upheld it as constitutional. I signed this opinion, as did others in the majority, and I still think it was correctly decided *under pre-Miller standards*. The standard in question involved the exhibition "with intent to primarily appeal to the prurient interest of the average person". La. R.S. 14:106(2).

No argument is made that *this* statutory test satisfies the requirements of *Miller*. As there set forth, the permissible scope of regulation must include sexual conduct "specifically described by the applicable state law, as written or authoritatively construed". 93 S.Ct. 2615. The state itself concedes that the general language of our obscenity statute does not meet this standard, but urges us to reconstrue it ex post facto so as *now* to meet the *Miller* standards.

It is suggested, for instance, that we construe the general terms to accord with the suggested example of what a statute could define for regulation so as to meet the *Miller* test of constitutionality, 93 S.Ct. 2615:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Our authoritative interpretation of our statute in *Gay Times* does not meet this standard. This interpretation was in effect at the time the offending conduct occurred. To *re*-interpret the statute so as to make it constitutional under the new *Miller* standards is not the easy answer it seems.

In the first place, to attempt to punish criminally pre-*Miller* conduct by a *new* post-*Miller* "authoritative interpretation", a new law so to speak, raises serious ex post facto questions of due process. See, e.g., James v. United States, 360 U.S. 213, 81 S.Ct. 1052 (1961).

In the second place, the judicial amendment of a legislative statute so as to specifically describe conduct criminally penalized seems to me to raise serious questions of true judicial legislation. As another concurring opinion suggests, why this standard of conduct and not instead the terms of the Oregon or Hawaii statutes or the City of New Orleans ordinance?

Formulating a criminal prohibition of substantive conduct appears to me far more legislative than the judicial revision of judge-made rules regulating introduction of evidence, instruction of the jury, argument to the jury, the continuing adjustment of the sort of quasi-procedural rules that for centuries has been regarded an appropriate function of the courts (but

which some of the dissenting brethren have suggested on other occasions is judicial legislation).

Rather than re-interpret our obscenity statue so as in effect to amend it, rather than give it a prospective interpretation so as to regulate future conduct (but exempt pre-*Miller* conduct), the majority has, it appears to me, adopted the most sensible approach to solution of the shambles of our obscenity laws wrought by the new *Miller* standards: We have left the specific definition and regulation of obscenity to the legislature.

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CALOGERO, Justice (concurring)

In an opinion handed down on February 19, 1973, I joined with a majority of this court in holding Louisiana's obscentiy statute constitutional under the then current United States Supreme Court standards. State v. Gay Times, Inc., 274 So.2d 162 (La. 1973).

Thereafter, on June 21, 1973, the United States Supreme Court handed down Miller v. California, ____ U.S. ____, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) and

four allied cases, announcing new and different standards, one of which was that proscribed conduct otherwise obscene must be specifically defined by applicable state law.

Our statute is clearly not specific in describing prohibited conduct. As written, therefore, it violates the First Amendment of the United States Constitution according to *Miller*. This, counsel for the State concedes.

Miller, however, in requiring specificity, apparently sanctions it, either as written *or* as "construed" by the highest courts of the respective states. Therefore the State here asks us to construe Louisiana's nonspecific, vague statute as prohibiting certain specified conduct.

But what, or which conduct? The State would argue that we have several options. There are two examples of such specifically described conduct in the *Miller* decision itself. That would suffice. Or why not the obscenity statue adopted by the State of Hawaii, or the State of Oregon? They each have a good one. Well, for that matter, why not engraft onto Louisiana's obscenity statute the specific conduct outlined in the obscenity ordinance of the City of New Orleans. After all, it was passed by the New Orleans City Council after, and in response to *Miller*, and being a studied effort on their part may well comply with the United States Constitutional standards outlined in *Miller*.

And what about the defendant before us? If we were now to write an obscenity law, should we then permit

prosecution for conduct which took place before this Court determined what specific conduct violates the law?

The answer to the latter question should be obvious. We needn't answer it however, for we have properly concluded in our opinion that it is not this Court's province to write an obscenity law for the State of Louisiana, but rather the State Legislature's.

For these reasons I have joined the majority in this case and fully subscribe to that opinion.

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SANDERS, Chief Justice (dissenting).

In February of this year, we held that LSA-R.S. 14:106, the Louisiana obscenity statute, was constitutional. State v. Gay Times, Inc., La. 274 So.2d 162 (1973). Today, nine months later, the majority wipes the statute from the books. Thus, the state is left with no statute to protect either the young or the old from filth thay may be thrust upon them. I record my dissent:

The majority bases its action on the recent decision of the United States Supreme Court in Miller v. California, ____ U.S. ____ 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The thrust of the Miller decision, however, is toward making state laws more effective against obscenity, not in destroying them. The Supreme Court makes this quite clear. The Court states:

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, *as written or authoritatively construed.* A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." [93] S.Ct. 2614, 2615; italics ours]

Again, it states:

> "We do not hold, as Mr. Justice BRENNAN intimates, that all States other than Oregon must now enact new obscenity statues. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See United States v. 12 200-Ft. Reels Film, ____ U.S. ____, (p. 7, n.7), 93 S.Ct.2665, p. 2670, n. 7, 37 L.Ed.2d 507 (1973)." [93 S.Ct. 2615 at f.n.6].

In the companion case of United States v. 12 200-ft Reels of Super 88 MM Film, ____ U.S. ____, 93 S.Ct. 2665, 37 L.Ed.2d 507 (1973), the United States Supreme Court reemphasizes this point in reference to the federal obscenity statute:

> "We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised . . .' and 'a construction of the statue is fairly possible by which the question may be avoided.' United States v. Thirty-Seven Photographs, 402 U.S. 363, 369, 91 S.Ct.1400, 1404, 28 L.Ed.2d 822 (1971) (opinion of White, J.), quoting from Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed.598 (1932). If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462, see United States v. Orito, supra, ____ U.S., at p. ____, 93 S.Ct., at p. 2676 (1973), we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard-core' sexual conduct given as examples in Miller v. California, supra, ____ U.S., at p. ____, 93 S.Ct., at pp. 2615-2616 (1973). See United States v. Thirty-Seven Photographs, supra, 402 U.S., at 369-374, 91 S.Ct., at 1404-1407 (1971) (opinion of White, J.). Of

course, Congress could always define other specific 'hardcore' conduct. [93 S.Ct.2670 at f.n.7]."

Thus, from the express language of the United States Supreme Court, it is clear that our statute is not unconstitutional on its face. The Miller decision means only that, in interpreting and enforcing our statue, we must apply the new standards, in some respects less exacting than those previously existing. See Wainwright v. Stone & Huffman, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1973).

The adoption of federal constitutional standards in the interpretation and enforcement of state statutes is an accepted judicial practice. See, e.g., State v. Eros Cinema, Inc., 262 La. 706, 264 So.2d 615 (1972); Levy v. State, Char. Hosp. of La., N. Orleans Bd. of Ad., 253 La. 73, 216 So.2d 818 (1968); State v. Rasheed, 248 La. 309, 178 So.2d 261, cert. den. 384 U.S. 1012 (1965); State v. Davidson, 248 La. 161, 177 So.2d 273 (1965); State v. Rideau, 246 La. 451, 165 So.2d 282 (1964).

The principle is correctly set forth in 16 Am.Jur.2d, Constitutional Law, §144, p. 345 as follows:

"In construing statutes with relation to constitutional provisions, the courts take into consideration the principle that every statute is to be read in the light of the Constitution, and that the Constitution and a statute involving constitutional rights will be construed together as one law. . . .

> "The rule has developed that the courts, in applying rules of statutory construction to legislation which is under constitutional attack, must do so with a view to bringing the legislation into line with constitutional requirements."

If our obscenity statute was constitutional under the harsh standards of Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), it is difficult to understand why it is not constitutional under less stringent standards. I would uphold the statute.

For the reasons assigned, I respectfully dissent.

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SUMMERS, Justice (dissenting).

Less than ten months ago, in State v. Gay Times, Inc., 274 So.2d 162 (La. 1973), by a clear majority, this Court upheld the constitutionality of Article 106 of the Criminal Code, Louisiana's obscenity law. At that time, under standards then prevailing and established by the United States Supreme Court in Roth v. United

States, 354 U.S. 476 (1957), we found Article 106 to be violative of no constitutional standard, federal or state Article 106 had been drawn to specficially incorporate the standards announced in the Roth Case.[1] There we declared that the statute "has reprobated material whose dominant theme appeals to the prurient interest in sex." Our decision pointed out that the constitutionality of Louisiana's obscenity law had twice been sustained against charges that its language was too vague and indefinite in State v. Henry, 250 La. 682, 198 So.2d 889 (1967), and State v. Roufa, 241 La. 474, 129 So.2d 743 (1961). In State v. Gay Times, Inc., we found the material involved "offensive by any standard." The material involved in the case at bar is of the same character.

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[1]La. Crim. Code art. 106 A(2) and (3) provides:

"A. Obscenity is the intentional:

* * * *

"(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

"(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person."

* * * *

The significance of the Roth decision was the Court's reaffirmance of the proposition that obscene materials were not protected by the First Amendment. Five Justices joined in the opinion stating: "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance . . . This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568 . . ."

The rationale of those decisions is that certain well-defined and narrowly limited classes of speech, including the lewd and obscene have never been thought to raise any constitutinal problem. Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. The Constitution gives no one the right to scandalize or otherwise shock the public. *State v. Van Wye,* 136 Mo. 227, 37 S.W. 938 (1896); *State v. McKee,* 73 Conn. 18, 46 A. 409, (1900).

The material involved in the instant case cannot meet any standard of decency or morality. It is vile, filthy, perverted and degenerating. Truly, this material is designed to debauch the public morals.

In the meantime on June 21, 1973 the United States Supreme Court decided *Miller v. California* , ____ U.S. ____, 37 L. Ed. 2d 419, one of a number of "obscenity-pornography" cases under review in a reexamination of standards in earlier cases involving "the intractable obscenity problem." The Court in *Miller* again reaf-

firmed the proposition that obscene material is not protected by the First Amendment and that the States have a legitimate interest in regulating commerce in obscene material and its exhibition. Specifically the Court approved regulation by state statutes of patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals. All of the books involved in the instant case fall within the categories approved for regulation.

The *Miller* Court then decided that the proper First Amendment standards to be applied by the states in determining whether particular material was obscene and subject to regulation, were (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to prurient interests, (b) whether the work depicted or described, in a patently offensive way, sexual conduct specifically defined by the applicable state law, as written or *authoritively construed*, and (c) whether the work, taken as a whole, lacked serious literary, artistic, political, or scientific value. Thus the *Miller* Case did away with the requirement that the material be "utterly without redeeming social value" which had been imposed by *Memoirs v. Massachusetts*, 383 U.S. 413 (1964). In addition, the community standard was defined, as the word implies, to mean the community where the offense occurred. The notion that a national standard be applied to all states was rejected. In effect, therefore, the *Miller* Case did not

impose more stringent requirements for State obscenity statutes to meet constitutional tests. To the contrary, the tests have been relaxed by that decision, giving more liberality to the states to uphold their obscenity statutes.

Soon after the decision in *Miller*, on November 5, 1973, in *Wainwright & Stone v. Huffman*, No. 73-122, the Supreme Court said "we must take the statute as though it read precisely as the highest court of the State has interpreted it ... interpretation by [the state court] puts these words in the statute as definitely as if it has been so amended by the legislature." Claims of impermissible vagueness must be judged in that light.

Anyone would find that these books appeal to the prurient interest; they describe and depict sexual conduct in an offensive way; and, taken as a whole, they lack literary, artistic, political, or scientific value. If these books are relevant to our society today, the question is how much relevancy can society endure.

Many decisions have recognized that the terms of obscenity statutes are not precise. Lack of precision is not itself offensive to the requirements of due process. And the Constitution does not require impossible standards; all that is required is that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *United States v. Petrillo*, 332 US. 1 (1947).

In my view the words of Article 106, applied according to the proper standards for judging obscenity, referred to above, give adequate warning of the conduct proscribed and mark boundaries sufficiently distinct for judges and juries to administer the law. *Roth v. United States*, 354 U.S. at 491 (1957). This I know — I have no trouble whatsoever in finding that these publications appeal to the prurient interest, and that they are explicitly obscene, patently offensive and utterly without literary, artistic, political or scientific value. Why, when the matter is so clear to me, the majority, or, for that matter any reasonable person, would have difficulty in determining the side of the line between obscene and nonobscene on which these books fall is incomprehensible. How anyone could find that these books do not fall within the prohibition of this statute is hard to understand.

Other courts have experienced no difficulty with the language of statutes such as ours. In *United States v. 12-200 Foot Reels of Film*, 93 S. Ct. 2665 (1973), in construing a Federal statute which condemns importation into the United States from any foreign country "... any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing ... or other article which is obscene or immoral ...." (a statute containing none of the definitive elements of obscenity contended for by defendant) and refusing to declare that statute unconstitutional, the Court noted:

> If and when such a "serious doubt" is raised as to the vagueness of the words "obscene",

"lewd", "lascivious", "filthy", "indecent", or "immoral" as used to describe regulated material in 19 U.S.C. Sec. 1305 (a) and 18 U.S.C. Sec. 1462, see United States v. Orito, 93 S.Ct. at p. 2676 (1973), we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California.

Thus, the very Supreme Court which prescribes the guidelines in *Miller v. California*, which the majority in the instant case construes to hold our Act unconstitutional, is prepared to supply an interpretation to fulfill *Miller* in connection with the Federal Statute in *12-200 Ft. Reels*. The Federal Statute contains no more for description than the word "obscene".

Other states have construed their obscenity statutes since the decision in *Miller* with special reference to its pronouncements. Massachusetts, in *Commonwealth v. Claflin*, 298 N.E. 2d 888 (1973) upholds the constitutionality of the Massachusetts Statute against the claim that it contains "no clear standards by which obscenity may be judged." The statute actually is less explicit than Louisiana's, reading only that "whoever ... sells or distributes a pamphlet ... or other thing which is obscene, indecent or impure, or an obscene indecent or impure print, picture ... for the purpose of sale ..." shall be punished.

In *State, ex rel Keating v. Vixen*, 35 Ohio St. 2d 215 301 N.E. 2d 880 (1973), Ohio upholds its statute in ligh

of *Miller* upon remand from the United States Supreme Court, remand having been ordered for "further consideration in light of Miller." Adopting its construction prior to remand the Supreme Court of Ohio declared:

> Those two sections [R.C. 2905.34 and 2905.35], now the law of Ohio, when construed together and applied to the instant facts, effectively provide that: "No person, with knowledge of the content and character of the ... motion picture ... involved, shall ... present *such* motion picture ... before an audience *which* contains a series of displays ... of ... sexual intercourse ... the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is ... for commercial exploitation ...." (Italicized words supplied.) So stated, they prescribe conduct which "bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion." Schneider v. State (1939), 308 U.S. 147, 161, 60 S. Ct. 146, 150, 84 L. Ed. 155.
>
> Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof "for commercial exploitation rather than for a genuine, scientific, educational, sociological, moral or artistic purpose" is forbidden by Ohio law. Here, there is no dispute as to the fact that "Vixen" does depict numer-

> ous acts of purported sexual intercourse, and obviously it does so for a commercial purpose
> ...

The foregoing statute was held to comport with the standards enunciated in *Miller*. Therefore, the Ohio court adhered to its holding before *Miller* in the light of *Miller*.

Florida's statute prohibits the sale, distribution, showing or possession of "any obscene, lewd, lascivious, filthy, indecent, sadistic or masochistic book, magazine ... photograph, motion picture film ...." A prosecution in *State v. Rhodes*, 283 So. 2d 351 (Fla. 1973) for a 1971 offense resulted in a conviction. Referring to the "cluster" of eight U.S. Supreme Court decisions, including *Miller v. California*, rendered on June 21, 25, 1973, the Court discussed the constitutional sufficiency of its statute, saying:

> As to the constitutional sufficiency of §847.011 *per se* regarding no specific elaboration on the words obscene, lewd and lascivious, we must take the constitutional view that although there is a new test of obscenity in the aforementioned recent federal opinions, it does not avail us insofar as the sufficiency of the statutory language is concerned for purposes of the earlier offense before us for review,
>
> . . .
>
> The unavailability of the new test, however, in the prosecution of an earlier offense, does

not preclude a conviction, nor the upholding of the validity of our Florida statute. For *Miller* has said,

> "As a result, we now confine the permissible scope of such regulation [by the state] to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or *authoritively construed.* (emphasis added)."

By clear and continuing declarations we have for many years past "authoritively construed" the statutory language of "lewd and lascivious". We have said in plain, understandable language that these statutory words proscribe "an unlawful indulgence in lust; eager for sexual indulgence; open and public indecency" offensive to others.

. . .

We hold the language of Fla. State. §847.011 F.S.A., as heretofore authoritively construed to be sufficient to meet the requirements of notice to the person of ordinary understanding, of the conduct proscribed as obscene, lewd and lascivious such as that here involved. Such offender has accordingly had prior notice of our constant, clear judicial determinations with respect to "lewd and lascivious" in the statute.

Can any doubt remain that Louisiana's statute makes unlawful depiction of hard core sexual activity which is "offensive by any standard"?

I do not preclude the possibility, or probability, that future fact situations may present problems, but this one does not. Not only the language of the statute puts this defendant on notice, but the "authoritive construction" of the statute in our former decision in *State v. Gay Times, Inc., State v. Roufa* and *State v. Henry* leave little doubt what is prohibited by Louisiana law. At least material which is obscene "by any standard" is prohibited.

The holding of the majority declaring the obscenity laws of this State unconstitutional, prospectively and retroactively, leaves the State of Louisiana without any law whatsoever to regulate, limit or proscribe the dissemination or exhibition of obscene pornographic matter, no matter how vile or degrading. Our citizens, young and old, children and adolescents, too, then, are left to the detestable, dehumanizing and decivilizing influences of this nefarious trade.

This case, and the cases of *Gulf States Theatres of Louisiana, Inc., United Artist Corp. and Joe Gianforte vs. John A. Richardson and George W. D'Artois,* No. 54,044, rendered December 3, 1973; *State of Louisiana v. Richard L. McNutt,* No. 52,489, rendered December 3, 1973, and *State of Louisiana and Parish of Caddo v. Gulf States Theatres of Louisiana, Inc. et al,* No. 52,132, rendered December 3, 1973, bring to a crescendo the shambles this majority is making of

the criminal laws of this State. In the short space of less than one year, in the long series of cases they have decided, reversing convictions, overruling existing jurisprudence, declaring legislative enactments unconstitutional and formulating rules of law properly within the realm of the Legislature, all favor the felon and misdemeanant; none has served the cause of law and order.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 53,985

SHREVEPORT NEWS AGENCY, INC.

MARCUS, Justice (dissenting)

I dissent. I am of the opinion that R.S. 14:106A(2) and (3) are constitutional. We recently held the second section of this statute constitutional. State v. Gay Times, Inc., 274 So.2d 162 (La. 1973). I find that the Louisiana Obscenity Statute (R.S. 14:106) may be interpreted to meet the guidelines set forth by the United States Supreme Court in its recent decision in Miller v. California, 413 U.S. ____, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

If a criminal statute is so vague and indefinite that men of common intelligence must necessarily guess

at its meaning and differ as to its interpretation, the statute is unconstitutional. However, when the language of the statute is sufficiently descriptive and has a fixed and well-accepted meaning, it is not overly broad and indefinite so as to make it unconstitutional. I find that the Louisiana Obscenity Statute makes it clear as to the type of conduct which would constitute a violation of the statute. It is not overly broad or indefinite. Accordingly, it may be interpreted by this Court in accordance with the guidelines set forth in the Miller case. I disagree with the majority that R.S. 14:106A(2) and (3) are unconstitutional.

APPENDIX N

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 53,985

SHREVEPORT NEWS AGENCY, INC.

ORDER FOR STAY AND RECALL OF JUDGMENT

On consideration of the Petition, Motion and Application of the State of Louisiana in the above numbered and entitled cause:

IT IS ORDERED that the execution and enforcement of the Judgment and Decree rendered in the above entitled and numbered cause be, and it is hereby stayed, and arrested pending and until the 11th day of April, 1974, in order to permit the State of Louisiana to seek a Writ of Certiorari from the United States Supreme Court and, in the event that the State of Louisiana shall timely apply to said Court for Writs of Certiorari or review, then it is ordered that the execution and mandate, and enforcement of the Judgment and Decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed and arrested until the Supreme Court of the United States shall have made its final disposition of this case.

New Orleans, Louisiana, this 14th day of January, 1974.

/s/ JOE W. SANDERS
CHIEF JUSTICE,
SUPREME COURT OF
LOUISIANA

APPENDIX O

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 52,489

RICHARD LEE McNUTT

APPEAL FROM THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "E"; THE HONORABLE RUDOLPH F. BECKER, JR., JUDGE.

BARHAM, Justice.

Defendant, McNutt, was charged in four counts of a bill of information with violating the obscenity statute, R.S. 14:106 (2), and was found guilty, after a trial before a judge, of three of the four counts.[1] Defendant was sentenced to pay a fine of $500.00 or to serve six months in the parish jail as to each of three counts, all sentences to run concurrently. Additionally, the court assessed court costs in the amount of $28.00, in default of payment of which the defendant is to serve an additional 30 days in the parish prison.

Defendant's Bill of Exceptions No. 3 was reserved to an adverse ruling on defendant's motion to quash the indictment. Among other grounds, the motion alleges that the statute under which defendant was

[1]The trial court, upon motion of defense counsel, granted a directed verdict as to Count One of the bill of information because the State failed to offer into evidence the magazine "Cherry" named in that count.

charged is unconstitutional in violation of the First and Fourteenth Amendments of the Constitution of the United States and Article 1, Sections 2 and 3 of the Constitution of the State of Louisiana.

The defendant here is charged with sale of magazines in violation of Louisiana's obscenity statute, R.S. 14:106:

> "Obscenity is the intentional:
>
> * * *
>
> (2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper * * *."[2]

At the time of the trial of this defendant it could be stated unequivocally that *Louisiana's highest court* had interpreted and applied the obscenity statute to prohibit the sale of *all* "lewd, lascivious, filthy and sexually indecent" expression within the ambit of the safeguards set forth in Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). A perusal of the evolution of the obscenity statute makes it clear that *our legislature* intended to prohibit the display and distribution of *all* "lewd, lascivious, filthy or sex-

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[2]As amended by Act 199 of 1960.

ually indecent" matter or materials which could constitutionally be prohibited. When the trial court ruled upon the defendant's motion to quash on the grounds of unconstitutionality, it was correct under the last interpretation and application of that statute by the highest court of this state. However, while this matter was pending on appeal, the United States Supreme Court handed down five cases concerning obscenity statutes. We must decide the constitutionality of our statute under the latest pronouncement by the United States Supreme Court. The principal case which affects our decision is Miller v. California, ____U.S.____, 93 S.Ct. *2607*, 37 L.Ed.2d 419 (1973).[3]

We have this day, in the case of State of Louisiana v. Shreveport News Agency, Inc., No. 53,985, ____ So.2d ____ (La. 1973), determined that the United States Supreme Court's pronouncement in the Miller case has made our statute unconstitutional.

For the reasons assigned in that case, and pursuant to the clear pronouncement by the United States Supreme Court, we have declared R.S. 14:106 (2) to be unconstitutional. The conviction and sentence of the defendant are set aside and the defendant is ordered discharged.

---

[3]See also: Paris Adult Theatre I v. Slaton, ____ U.S. ____, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); U.S. v. Orito, ____ U.S. ____, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); Kaplan v. California, ____ U.S. ____, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); United States v. 12 200 Ft. Reels of Super 8mm. Film, et al., ____ U.S. ____, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

Sanders, C. J., dissents for the reasons assigned by him in State v. Shreveport News Agency, Inc., No. 53,985.

Summers, J., dissents and will assign reasons.

Culpepper, J., dissents for the reasons assigned by Sanders.

Calogero, J., subscribes to the foregoing opinion and assigns additionally his concurring reasons in State of Louisiana in Shreveport News Agency, Inc., handed down this day.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 52,489

RICHARD LEE McNUTT

SUMMERS, Justice (dissenting).

I dissent for the reasons assigned in State v. Shreveport News Agency, Inc., No. 53,985, rendered December 3, 1973.

APPENDIX P

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 52,489

RICHARD LEE McNUTT

Appeal From The Criminal District Court For The Parish Of Orleans, Section E; the Honorable Rudolph F. Becker, Jr., Judge.

MOTION FOR STAY OF MANDATE

The State of Louisiana respectfully asks this Honorable Court to stay the mandate in the above-captioned matter for a period of 90 days so that the State of Louisiana may have time to prepare and file a Petition For Writ of Certiorari in the Supreme Court of the United States, asking that court to set aside the majority decision herein.

/s/ LOUISE KORNS
LOUISE KORNS
Assistant District Attorney

ORDER

Considering the foregoing,

IT IS HEREBY ORDERED that the mandate herein be stayed for a period of 90 days so that the State of Louisiana may prepare and file a Petition For Writ of Certiorari in the Supreme Court of the United States.

/s/ JOE W. SANDERS
JOE W. SANDERS
CHIEF JUSTICE

New Orleans, Louisiana, this
14 day of January, 1974.

FILED
APR 29 1974
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1458

STATE OF LOUISIANA AND THE PARISH OF CADDO,
Petitioners,

versus

GULF STATES THEATRES OF LOUISIANA, INC., ET AL.,
Respondents.

JOHN A. RICHARDSON AND GEORGE W. D'ARTOIS,
Petitioners,

versus

GULF STATES THEATRES OF LOUISIANA, INC., ET AL.,
Respondents.

Petitions for Writs of Certiorari to the Supreme Court of Louisiana

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-1458

STATE OF LOUISIANA AND THE
PARISH OF CADDO,
Petitioners,

versus

GULF STATES THEATRES OF LOUISIANA, INC.,
ET AL.,
Respondents.

JOHN A. RICHARDSON AND
GEORGE W. D'ARTOIS,
Petitioners,

versus

GULF STATES THEATRES OF LOUISIANA, INC.,
ET AL.,
Respondents.

Petitions For Writs of Certiorari To The Supreme Court of Louisiana

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Respondents respectfully pray that this Court deny the request of Petitioners that Writs of Certiorari issue to review the decisions of the Supreme Court of Louisiana, entered in these captioned and related cases on December 3, 1973, holding that, on their face, the Louisiana Criminal Obscenity Statute, La. R.S. 14:106, and the Louisiana Nuisance Statute, La. R.S. 13:4711 et seq, violated both the Louisiana Constitution and the Constitution of the United States. The Petitioners have, pursuant to Rule 23(5) of the Rules of this Court, filed a single Petition for Writs of Certiorari covering all the cases, and Respondents herein, Gulf States Theatres of Louisiana, Inc., United Artists Corporation, and Joe Gianforte, submit a combined Brief in Opposition.

CITATIONS TO OPINIONS BELOW

The opinion of the Louisiana Supreme Court in *State v. Shreveport News Agency, Inc.*, wherein the Court held La. R.S. 14:106 unconstitutional is reported at 287 So.2d 464 and is included as Appendix M. p. 174a, of the Petitioners' Application. The opinion of the Louisiana Supreme Court in *Gulf States Theatres of Louisiana, Inc., et al v. John A. Richardson and George W. D'Artois*, wherein the Court held that La. R.S. 13:4711, et seq., was unconstitutional, is reported at 287 So.2d 480 and is included as Appendix J, p. 126a, of the Petitioners' Application. The two companion cases to the above decisions, also decided on December 3, 1973, are

State v. McNutt, 287 So.2d 478, Appendix O, p. 213a, Petitioners' Application, and *State v. Gulf States Theatres of Louisiana, Inc., et al*, 287 So.2d 496, Appendix F, p. 102a, Petitioners' Application. Because the Civil Nuisance Statute La. R.S. 13:4711, adopts the definition of obscenity found in La. R.S. 14:106, Respondents in this Brief address themselves to both statutes and the impropriety of review of any of the above companion decisions of the Louisiana Supreme Court. The Civil Nuisance Statute is reproduced as Appendix A, p. 2a of the Petitioners' Application.

QUESTIONS PRESENTED

1. Whether the Louisiana Supreme Court improperly applied this Court's decision in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) when it concluded that La. R.S. 14:106, the Louisiana Criminal Obscenity Statute, was unconstitutional on its face due to overbreadth and absence of a specific definition of the conduct that is prohibited, and therefore violated both the Louisiana Constitution and the United States Constitution.

2. Whether the Louisiana Supreme Court improperly held that La. R.S. 13:4711 et seq. is unconstitutional on its face because that statute:

   (a) mandates the issuance of a temporary injunction without an independent judicial finding of probable cause;

(b) provides no standards for issuance of that ex parte injunction;

(c) provides, in a civil nuisance proceeding, for a prior restraint without notice or hearing;

(d) fails to provide for a prompt adversary hearing;

(e) fails to provide for a prompt appeal;

(f) provides for the closing of the building for one year;

(g) causes a deprivation of property without due process of law; and

(h) constitutes a prior restraint on future expressions, and thus violated both the Louisiana Constitution and the United States Constitution.

STATEMENT OF THE CASES

A. "The Stewardesses"

On June 11, 1971, the nationally released motion picture "The Stewardesses" opened at the Broadmoor Theatre in Shreveport, Louisiana. The Broadmoor is an established, first-run theatre, located in a commercial area near the Broadmoor Shopping Center on a state highway. Six members of a men's Bible class

went to the movie to "prejudge it". Thereafter, with the cooperation of the local District Attorney, they signed an affidavit purportedly reciting scenes from the film and the trial court, without ever viewing the film, signed a temporary restraining order prohibiting the further showing of the movie. The subsequent legal proceedings consumed more than *two years* during which the film was not shown.

The film was officially rated by the Motion Picture Association of America and given a rating of X which does not permit its showing to audiences below the age of seventeen years, and this rating was observed at the box office. "The Stewardesses" ran uneventfully in Shreveport for fourteen days, during which time it met wide local acceptance and was seen by over 12,000 persons. Over ninety-five percent of the comments received by the local manager were favorable. Its popularity locally was paralleled nationally for, during the summer of 1971, it was one of the top ten rated most popular motion pictures showing throughout the United States, being exhibited in first run theatres in some 180 American cities, including New Orleans, Houston, Dallas, Beaumont and Atlanta, and was seen by over 3,000,000 persons.

During a successful two-week run in Shreveport, and while it was playing to capacity audiences of persons over 18 years of age at the two (7:00 p. m. and 9:00 p. m.) daily showings, on Friday, June 25, 1971, shortly after 6:00 p. m. the theatre manager was served by a Caddo Parish Deputy Sheriff with a paper entitled "Injunction and Temporary Restraining Order and

Rule to Show Cause", which, in the name of the State of Louisiana and the First Judicial District Court, "ordered, restrained, enjoined and prohibited" defendants from "exhibiting the motion picture 'The Stewardesses'" and "from conducting the said nuisance known as the Broadmoor Theatre". This order was signed by a state district judge (Alexander) *who had not seen the movie*, on the basis of a petition and affidavit signed by the District Attorney (John A. Richardson) and an Assistant District Attorney (Charles R. Lindsay) of Caddo Parish, *neither of whom had seen the motion picture*, on the basis of alleged complaints of "numerous residents" of the neighborhood. Upon receipt of this order the manager stopped the showing of "The Stewardesses" scheduled for that night and closed the theatre. "The Stewardesses" has not been shown since that date in Shreveport.

The peremptory order and injunction served upon defendants also directed them to "show cause" at 10:00 a. m. on Wednesday, June 30, 1971, why a "final judgment of injunction" should not be rendered perpetually enjoining the exhibition of "The Stewardesses", directing the closing of the theatre for one year and the removal of all furniture, fixtures and equipment from the premises. This order was served upon defendant *Gulf States* on Monday, June 28 (two days before the rule was returnable) and upon defendant, *Greater Broadmoor*, on Tuesday, June 29, 1971, only one day before this hearing. Counsel was employed on Monday, June 28th. At the return date on Wednesday, June 30th, before another state district judge (Fleniken), defendants filed certain motions, including a plea that the

procedure utilized was unconstitutional, and a motion for a continuance, asking for a short postponement in order to allow a reasonable time to prepare their case, obtain witnesses, and offered not to show this film in the interim. All motions and the request for a continuance were denied, a trial on the rule nisi had to the end result that Judge Fleniken, who, like the District Attorney, *never viewed the film*, held it to be obscene and its showing was permanently enjoined in Caddo Parish. (The theatre was not padlocked or the furniture removed but the District Judge said that if this "type" of motion picture was ever shown again then such action would be taken.)

Subsequent legal proceedings consumed approximately two years. Upon application of Respondents herein, this Court reversed and remanded "The Stewardesses" case to the Supreme Court of Louisiana for further consideration in light of this Court's decision in *Miller v. California* and companion cases decided at 287 So.2d 496 (1974).

On remand, oral argument was heard by the Louisiana Supreme Court and that court, for the reasons assigned by it in *State v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1974), *State v. McNutt*, 287 So.2d 478 (1974), and *Gulf States Theatres of Louisiana, Inc. v. John A. Richardson and George W. D'Artois*, 287 So.2d 480 (1974) reversed its previous judgment and Petitioners' suit was dismissed. That opinion is reported in June, 1973.

B. "Last Tango in Paris"

This is a civil case which originally arose as a result of the Petitioners' attempt to prevent the showing of "Last Tango in Paris" in Shreveport, Louisiana. This film, which the Petitioners in their Application label as "hard core pornography", was nominated by the Academy of Motion Picture Arts and Sciences for the awards of Best Actor of the Year (Marlon Brando) and Best Director of the Year (Bernardo Bertolucci). "Last Tango" was first shown at the Don Theatre on Friday evening, September 28, 1973. After the first showing of the motion picture, the Petitioner, John A. Richardson, District Attorney for the Parish of Caddo, and George W. D'Artois, the Commissioner of Public Safety for the City of Shreveport, Louisiana, caused a warrant to issue for the arrest of the exhibitor, Joe Gianforte and seized the print of the motion picture. Gianforte was charged with a violation of La. R.S. 14:106 and was released on $1,000 bond. Following his release Gianforte obtained another copy of the print and resumed exhibition of the film at the Don Theatre. Thereafter, on Saturday afternoon, September 29, 1973 at 5 o'clock p.m., following the exhibition of the film at 2 o'clock p.m., Petitioners John A. Richardson and George W. D'Artois obtained a second warrant for Gianforte's arrest and *seized a second copy of the motion picture print.* The Respondents herein filed a complaint for a temporary restraining order or preliminary injunction in the United States District Court for the Western District of Louisiana which was granted on September 29, 1973, prohibiting Petitioners from making future arrests or seizing additional copies of

the film. Upon the expiration of that restraining order, Respondents sought further injunctive relief from the First Judicial District Court for Caddo Parish and from the Fifth Circuit Court of Appeals for the United States, both of which denied relief. Upon petition to the Louisiana Supreme Court, that Court ordered the First Judicial District Court for the Parish of Caddo to restrain the Petitioners, John A. Richardson and George W. D'Artois, from interferring with the showing of the motion picture film "Last Tango in Paris" and from making future seizures of prints pending a judicial determination of the issues. A hearing was then held before the Hon. James E. Clark, First Judicial District Court, Caddo Parish, who concluded that the film was obscene and enjoined its exhibition. Evidence was adduced at the trial that the film was widely accepted and broke most attendance records for the Respondents in Shreveport. Respondents were then granted a Writ of Certiorari by the Louisiana Supreme Court, which reversed the trial court and held the provisions of La. R.S. 13:4711 et seq. unconstitutional. 287 So.2d 480. The Louisiana Supreme Court then denied rehearing. This Court subsequently refused to issue a stay order to the Louisiana Supreme Court.

REASONS FOR DENYING THE WRITS

I.

The Louisiana Supreme Court did not improperly apply this Court's decision in *Miller v. California* in holding that the Louisiana Criminal Obscenity Statute La. R.S. 14:106, is unconstitutional on its face. In *Miller*

this Court unambiguously *returned to the states* the issue of obscenity. Now, dissatisfied with the opinion of the highest court of this state, the Petitioners ask this Court to reverse the pronouncements of *Miller* and once again take upon itself the burdens of reviewing issues specifically relegated to the several states in *Miller*.

Rule 19(1)(a) of this Court's rules states that a general consideration in reviewing a petition for certiorari is whether "a state court has decided a federal question of substance not heretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court." Clearly, the Louisiana Supreme Court correctly interpreted *Miller* as requiring specificity of definition in obscenity statutes, either as written or as authoritatively construed, and, finding Louisiana's obscenity statute lacking in specificity, that Court further rejected the option of "authoritative construction" as foreign to the state's jurisprudence regarding statutory construction.

II.

There are adequate state grounds for the Louisiana Supreme Court's determination that La. R.S. 14:106 is unconstitutional. The Louisiana Supreme Court concluded that La. R.S. 14:106 violated "Article I, Sections 2 and 3 of the Constitution of the State of Louisiana," *State v. Gulf States Theatres of Louisiana, Inc.*, 287 So.2d 496, 497 (Petitioners' Application, Appendix F, p. 101a), as well as violating the United States Constitution. The Louisiana Constitution, Article I, Section 3,

reads: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty". The *Miller* decision mandated that prohibited *"conduct must be specifically defined by the applicable state law* as written or authoritatively construed." (Emphasis supplied.) Because it is obvious upon the face of La. R.S. 14:106 that it lacks such specificity as written, the State of Louisiana asserts that the Louisiana Supreme Court committed error in refusing to save the statute by "authoritative construction", that is, by itself *defining* the acts prohibited by the general language of the statute. The Louisiana Supreme Court expressly declined to "authoritatively construe" this statute and stressed that under the jurisprudential history of this state, and as a matter of state law, the Louisiana Supreme Court had for decades consistently rejected the notion that it had the power to "define" criminal statutes; *State v. Christine,* 239 La. 259, 290, 118 So.2d 403, 414 (1960); *State v. Vanicor,* 118 So.2d 438, 440 (1960); *State v. Truby,* 211 La. 178, 29 So.2d 758, 759 (1947); *State v. Kraft,* 214 La. 351, 37 So.2d 815, 816 (1948); or that such was desirable in any case. Thus, the Louisiana Supreme Court specifically returned that task to the Louisiana legislature. Without doubt, the intent of *Miller* in allowing states to "authoritatively construe" these statutes was to free state courts to interpret obscenity statutes so as to incorporate the constitutional criteria of *Miller,* but nothing in *Miller requires* them to do so. *Miller* did *not* intend to *force* state courts to remedy deficiencies of

definition in order to protect the constitutionality of these statutes.

III.

Many other courts have held obscenity statutes unconstitutional when tested by the principles of *Miller*. Several state statutes have been held unconstitutional in decisions subsequent to *Miller*: *United Artists Corp. v. Wright, et al*, (M.D. Ala.) ____F.Supp.____ (January 5, 1974); *Airways Theatre, Inc., et al v. Canale, et al*, (W.D. Tenn.) 366 F.Supp. 343 (November 19, 1973); *Hamar Theatres, Inc. v. Cryan*, (D.N.J.) 365 F.Supp. 1312 (July 26, 1973); *McCright v. Olson*, (D.N.Dak.) 367 F.Supp. 937 (December 17, 1973); *Sanders v. State*, 203 S.E.2d 153 (Ga. Sup.Ct., January 28, 1974); *Art Theatre Guild, Inc. v. State ex rel Rhodes*, ____SW2d____ (Tenn.Sup.Ct. February 19, 1974);[1] *State v. Wedelstedt*, 213 N.W.2d 652, (Sup.Ct. Iowa, December 19, 1973); *Stroud v. State*, 300 N.E.2d 100, (Ind. Sup.Ct., 1973); *Mohney v. State*, 300 N.E.2d 67 (Ind. Sup. Ct. 1973); *State v. Lavin*, ____ Iowa ____ (August 13, 1973, Dist.Ct. Iowa); *Commonwealth v. Horton*, (Sup. Jud.Ct. of Mass., April 23, 1974. Essentially, the argument of the Petitioners is that this Court should mandate the Louisiana Supreme Court to "authoritatively construe" the Louisiana Obscenity Statute in order to preserve its constitutionality. Such a decision would be without historical precedent in the jurisprudence

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[1]This decision was subsequent to the decision of *Art Theatre Guild, Inc. v. State ex rel Rhodes*, 469 SW2d 669, cited by the Petitioners at p. 53 of their Application. The decision cited by Petitioners was issued on July 19, 1971, approximately two years prior to *Miller*.

of this Court and would blatantly violate traditional principles of federalism and comity. This Court in *Miller* stressed: "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete *legislative efforts*. . ." 41 U.S.L.W. 4928. The logical extension of the Petitioners' argument is that this Court additionally order all other lower courts to rescue their invalid statutes by judicially adding necessary specificity and definition. That argument is especially incongruous in light of the long-standing, and much cited, position of the Louisiana Supreme Court that it has no constitutional authority to add specificity to criminal statutes of this state. Repeating that doctrine, the Louisiana Supreme Court in *State of Louisiana v. Shreveport News Agency, Inc.* stated:

> "We are not of the opinion that we are endowed with the constitutional authority to redraft Louisiana obscenity statute. Our Court may interpret a statute, but it cannot re-write a statute in order to hold it constitutional." 287 So.2d 464, 469.

And further:

> "We reject any theory that we can authoritatively construe our criminal statute regulating obscenity so as to make it constitutional under the United States Supreme Court holding in Miller v. California. It is for the legislature to design a statute or statutes which meet

> the tests and formulations set forth by that Court." *Id.* at 470.

It would be inapposite for this Court, which in *Miller* returned the issue of obscenity to the states, to now require the Louisiana Supreme Court to apply "authoritative construction", a technique contrary to its historical jurisprudence, in order to save this state's criminal obscenity statute!

As stated in the concurring opinion of Justice Tate: "*The state itself concedes that the general language of our obscenity statute does not meet this standard* [of specifically defined conduct], but urges us to reconstrue it ex post facto so as *now* to meet the *Miller standards.*" *Shreveport News Agency, Inc.*, 287 So.2d at 471 (emphasis supplied).

The technique of "authoritative construction" is again rejected in the concurring opinion of Justice Calogero:

> "Our statute is clearly not specific in describing prohibited conduct... Miller, however, in requiring specificity, apparently sanctions it, either as written or as 'construed' by the highest courts of the respective states. Therefore the State here asks us to construe Louisiana's non-specific, vague statute as prohibiting certain specified conduct.

But what, or which conduct?

* * * *

[W]e have properly concluded in our opinion that *it is not this Court's province to write an obscenity law for the State of Louisiana, but rather the State Legislatures.*" 287 So.2d at 472. (emphasis supplied)

The Petitioners argue that these conclusions demonstrate that the Louisiana Supreme Court "misinterpreted" *Miller* because that Court refused to redeem the Louisiana statute by adding missing definition and specificity. Respondents respectfully suggest that for this Court to intervene it would be required to: (a) hold that the Louisiana statute is in fact specific and satisfies the standards of *Miller* (which as Justice Tate noted, even the Petitioners did not argue) or (b) *order* the Louisiana Supreme Court to add specificity, in contradiction of and in conflict with that Court's established refusal to ever add specificity to a criminal statute and in violation of principles of federalism. Either result is untenable. The tenable result is to allow the Louisiana legislature to enact a valid obscenity statute at its next session.

IV.

The Louisiana Supreme Court properly held that the Louisiana Civil Nuisance Statute, La. R.S. 13:4711 et seq. is unconstitutional on its face. The litany of deficiencies of that statute are set out in the Louisiana Supreme Court's opinion in *Gulf States Theatres of Louisiana, Inc., et al v. John A. Richardson and George*

W. *D'Artois*, 287 So.2d 480 (Petitioners' Application, Appendix J, p. 126a). Referring once again to this Court's rule 19(1)(a), this case is inappropriate for review because the Louisiana Supreme Court has issued a decision "in accord with applicable decisions of this Court", including *Miller v. California;* and its companion cases, *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789 (1973), *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796 (1973), and *Alexander v. Virginia*, 413 U.S. 836, 93 S.Ct. 2803 (1973).

V.

The Louisiana Supreme Court's determination that La. R.S. 13:4711 et seq. is unconstitutional was further based upon adequate state grounds. That Court concluded that the Louisiana Nuisance Statute violated the Louisiana Constitution, Article 1, Section 3, which protects freedom of speech from prior restraint. 287 So.2d at 491, (Petitioners' Application, Appendix J, p. 148a). Under the provisions of La. R.S. 13:4714, once it is determined that obscenity, as a nuisance, has occurred within a building, the trial court "shall direct *the effectual closing of the building, structure, land or other place against its use for any purpose for the period of one year,* unless sooner released." La. R.S. 13:4714, (Petitioners' Application, Appendix A, p. 6a) (emphasis supplied). The Louisiana Supreme Court concluded: *"This provision has the effect of sledgehammering the printing press, the camera, the projectors, all the tools of expression in every medium, so that there can be no future expression at all for one who transgresses by crossing the line from free speech*

to obscenity upon one occasion. We can envision no more fatal defect of prior restraint. . . ." 287 So.2d at 491 (emphasis supplied), (Petitioners' Application, Appendix J, p. 148a).

VI.

The Petition for Writs of Certiorari is further without merit in that *the United States Supreme Court has consistently refused to review petitions by states against state court decisions affecting a state's obscenity laws. See, e.g., Commonwealth v. Dell Publications, Inc.*, 427 Pa. 189, 233 A.2d 840 (1967), *cert. denied sub nom; Pennsylvania v. Dell Publications, Inc.*, 390 U.S. 948, 88 S.Ct. 1038 (1968); *People v. Noroff*, 63 Cal. Rptr. 575, 433 P.2d 479 (1967), *cert. denied sub nom; California v. Noroff*, 390 U.S. 1012, 88 S.Ct. 1261 (1968); *In Re Giannini*, 69 Cal.2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1968), *cert. denied sub nom, California v. Giannini*, 395 U.S. 910, 89 S.Ct. 1743 (1969). The Petitioners therefore request this Court to depart from its historical rejection of requests by states to review state court decisions in this area. The Petitioners further seek to enmesh this Court in the field of state obscenity *legislation*, an area which this Court clearly sought to return to the states in its obscenity decisions of the summer of 1973, including *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).[2]

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[2]The Louisiana Supreme Court issued a stay of its decision which expired on February 15, 1974. Justice Dixon dissented with the comment: "The state has pointed to no case in which the *state* has been granted a stay in such a case. . ." Petitioners' Application, Appendix L, page 167a.

VII.

The Petition for Writs of Certiorari is further unmeritorious in that the United States Supreme Court has *consistently maintained that it is without power to construe state legislation in this area. United States v. v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *United States v. Twelve 200-Foot Reels of Film*, 413 U.S. 123, 93 S.Ct. 2665, 41 U.S.L.W. 4963, n. 7 (1973); *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Cf. Coleman v. Alabama*, 399 U.S. 1 (1970). In *Thirty-Seven Photographs*, this court concluded: "[W]e lack jurisdiction authoritatively to construe state legislation." 402 U.S. 363, at 369. And, in refusing to construe a Georgia statute in *Gooding v. Wilson*, 405 U.S. 518 (1972), this Court concluded: "Only the Georgia courts can supply the requisite construction, since of course 'we lack jurisdiction authoritatively to construe state legislation.'" *Id.* at 520. And, in a companion case to *Miller*, this court recently restated: "[W]e must leave to the state courts the construction of state legislation. . ." *12 200-Ft. Reels of Super 8mm Film, et al.*, 413 U.S. 123, 41 U.S.L.W. 4963, n. 7. Therefore, by this Court's own consistent principles, the construction placed upon the Louisiana Obscenity Statutes by the Louisiana Supreme Court is final and binding upon this Court. The Louisiana Supreme Court has construed these statutes to be vague, overbroad and violative of the Louisiana and United States Constitutions.

VIII.

The Respondents fail to see the existence of any federal constitutional questions where a state supreme court concludes that state statutes are invalid because they violate both the State Constitution and the Constitution of the United States. And, in any event, the adequate state grounds for these decisions make review by certiorari inappropriate. *See, Monger v. Florida, cert. denied,* 405 U.S. 958, 92 S.Ct. 1163 (1972), *McKinney v. City of Birmingham, cert. denied,* 409 U.S. 895 (1972) and *Holden v. Arnebergh, appeal denied,* 394 U.S. 102, 89 S.Ct. 926 (1969). As stated by this Court in *Henry v. Mississippi,* 379 U.S. 443, 446, 85 S.Ct. 564, 567: "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest upon independent and adequate state grounds, even where those judgments also decide federal questions."

The Unconstitutionality of Louisiana Revised Statute 14:106(A), the Criminal Obscenity Statute

In *State of Louisiana v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1974) (also reported as Appendix M, p. 174a of Petitioners' Application), the Louisiana Supreme Court concluded that La. R.S. 14:106, the Criminal Obscenity Statute, is unconstitutional on its face. The statute at issue reads:

"Obscenity is the intentional:

(1) .....

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any *lewd, lascivious, filthy or sexually indecent* written composition, printed composition, book, magazine, pamphlet, newspaper. . .

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person.

(4) ....."

La. R.S. 14:106(A)
(Emphasis supplied)

In reviewing this statute, the Louisiana Supreme Court noted:

"We must decide the constitutionality of our statute under the latest pronouncement by the United States Supreme Court. The principle case which affects our decision is *Miller v. California. . .*" 287 So.2d at 467.

That Court took special note of the majority opinion in *Miller* concluding that "the United States Supreme Court in *Miller* laid down new tests for determining obscene material which could statutorily be controlled . . ." 287 So.2d at 467. This Court in *Miller* stressed the need for clarity and precision in the obscenity legislation when, speaking for the majority, Chief Justice Burger stated:

> "The dissent of Mr. Justice Brennan reviews the background of the obscenity problem, but since the court now undertakes to formulate standards *more concrete* than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions." 93 S.Ct. at pp. 2612-13.
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> * * * *
>
> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. *State statutes designed to regulate obscene materials must be carefully limited* . . . As a result, we now confine the permissible scope of such regulations to works which depict or described *sexual conduct. That conduct must be specifically defined by the applicable state law,* as written or authoritatively construed."
>
> * * * *

> "The basic guidelines for the trier of fact must be: . . . (b) whether the work depicts or describes, in a patently offensive way, *sexual conduct specifically defined by applicable state law. . .*"
>
> * * * *
>
> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless the materials depict or describe patently offensive '*hard core*' sexual conduct *specifically defined by the regulating state law* as written or construed." *Id.* at pp. 2614-15 (emphasis added).

Citing the language of *Miller* requiring specificity in obscenity legislation, the Louisiana Supreme Court concluded:

> "Thus it must be obvious, even to laymen and surely to this Court, that R.S. 14:106(2) does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California." 287 So.2d at 468.
>
> "[W]e conclude that R.S. 14:106(2), as considered and interpreted in light of Miller v. California, is over-broad, too general, and without the required specificity to withstand the constitutional attack under the U-

nited States Constitution. . . and our [Louisiana] Constitution. . ." 287 So.2d at 470.

The Unconstitutionality of La. R.S. 13:4711, et seq., The Louisiana Nuisance Statute

The Louisiana Supreme Court concluded that the Louisiana Nuisance Statute, La. R.S. 13:4711 et seq., was unconstitutional *on its face* as a matter of law. The Petitioners, in contrast, argue to this Court the facts giving rise to this litigation, which were not the basis of the Louisiana Supreme Court's opinion, and are irrelevant to their Petition for Certiorari.

Petitioners would have this court believe, in direct contravention to the findings and holdings of the Supreme Court of Louisiana, that the Louisiana Nuisance Statute is somehow valid on its face. On pages 58 and 59 of Petitioners' Application, we find listed six reasons Petitioners say the Louisiana Nuisance Statute provided Respondents with "First Amendment protection", and we submit the following in response to those assertions.

Petitioners say:

"1. Before the issuance of a temporary injunction, affidavits were presented to a District Court Judge alleging in *great detail* the obscene nature of the movie and the trial judge was able to make the *judicial determination* that a temporary injunction should issue."

The Supreme Court of Louisiana held to the contrary when it found that the Louisiana Nuisance Statute:

(a) mandates the issuance of a temporary injunction without a judicial finding of probable cause;

(b) provides no standard for issuance of that ex parte injunction;

(c) provides, in a civil nuisance proceeding, for a prior restraint without notice or hearing; and

(d) constitutes a prior restraint on future expressions.

See Gulf States Theatres of Louisiana, Inc., et al v. John A. Richardson and George W. D'Artois, 287 So.2d 480 (Petitioners' Application, Appendix J, page 126a et seq.).

Petitioners say:

"2. The temporary injunction remained in effect for a period of five days as to *this obscene movie only*, with respondents place of business being allowed to continue to operate with 'business as usual,' the only exception being that the obscene movie 'The Stewardesses' was not shown."

The Supreme Court of Louisiana held to the contrary, when it found the Louisiana Nuisance Statute:

(a) provides for the closing of the building for one year; and

(b) causes a deprivation of property without due process of law.

As noted by the Supreme Court of Louisiana ". . . *a statute which is unconstitutional on its face cannot be constitutionally enforced.*" *Gulf States Theatres of Louisiana, Inc., et al v. John A. Richardson and George W. D'Artois, supra.* The Petitioners concentration upon the facts as they occurred is misguided in that the true legal issue is the potential for abuse of a statute affecting First Amendment freedoms. *A statute which on its face is susceptible of being applied to constitutionally protected speech is unconstitutionally overbroad and cannot be constitutionally applied. Gooding v. Wilson,* 405 U.S. 518; *Grayned v. City of Rockford,* 408 U.S. 104.

Petitioners say:

"3. At the trial on the merits conducted within five days, the burden of proof was upon the plaintiff and that burden of proof was maintained."

The Supreme Court of Louisiana noted the procedural requirements of *Freedman v. Maryland,* 280 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), one of which

is that the burden of proving a film is unprotecte expression must rest on the censor, and not on th accused. In light of the "rule nisi" procedure com manded by the statute, it is therefore unconstitutiona on its face and cannot be constitutionally enforce

Petitioners say:

> "4. The decision by the trial court that the movie was, in fact, obscene, was handed down at the conclusion of the trial, on the same day thereof, within five days from the date of the filing of the original suit."

The Supreme Court of Louisiana held that the sta ute on its face failed to provide for prompt adversa hearing or a specific time in which a decision shou be made by the trial court.

With all respect to the trial court, the decision fin ing the movie "The Stewardesses" obscene by th tribunal meant little in that the court did not even vie the movie. The trial court's decision granting the pe manent injunction prohibiting the showing of the mov was merely the rubber stamping of the self-appointe censors' action in obtaining the temporary restrainin order five days earlier. Respondents simply were n granted the due process procedural rights to whic they were entitled, and a review of the trial court re ord, we submit, leads the reader to no other concl sion.

Petitioners say:

> "5. Respondents were granted an appeal to the Louisiana Second Circuit Court of Appeal as a matter of right."

As did the Court of Appeal of Louisiana, Second Circuit, some five months after trial the Supreme Court of Louisiana declared the Louisiana Nuisance Statute unconstitutional in that it failed to provide for a prompt appeal.

Petitioners say:

> "6. The theatre itself has not been closed but has, as stated above, continually operated since the date of filing of suit."

The Supreme Court of Louisiana held, to the contrary, that the statute, *on its face*, provides for the closing of the building for one year and causes a deprivation of property without due process of law.

The colloquy among the court and counsel at the conclusion of the trial court hearing, and the threat communicated by the trial judge, shows an additional reason why Respondents could take little solace in the fact they were allowed to continue operating at the theatre in question.

> "THE COURT: No, I am not holding that. I am holding that the showing of this movie is in violation of the statute. Now if they show

another movie and you come back in, showing that, then I think that possibly we would be justified in going ahead and doing what you are asking to be done in this case, closing the business for a year.

* * *

"THE COURT: Well, I am just telling you, Mr. Carmody, if you come back, I am going to close you for a year. You understand?

(Excerpts from Trial Court's Opinion found at Appendix B to Petitioners' Application, page 10a).

CONCLUSION

The Louisiana Supreme Court has held that the Civil Nuisance Statute and the Criminal Obscenity Statute are unconstitutional on their face in light of *Miller v. California*, and its companion cases. It is respectfully submitted that, for the reasons stated herein, the Petition for Writs of Certiorari should be denied.

Respectfully submitted,

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May 1, 1974

CERTIFICATE

This is to certify that I have this day served upon opposing counsel the within and foregoing Brief in Opposition to Petition for Writs of Certiorari to the Supreme Court of Louisiana, by mailing three (3) copies thereof, postage prepaid, to William J. Guste, Jr., Attorney General of Louisiana, State Capitol Building, Baton Rouge, Louisiana 70804, John A. Richardson, District Attorney, First Judicial District of Louisiana, 501 Caddo Parish Courthouse, Shreveport, Louisiana 71101, Harry Connick, District Attorney, Orleans Parish, State of Louisiana, 2700 Tulane Avenue, New Orleans, Louisiana 70119, this ____ day of April, 1974.

Of Counsel